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APPENDIX.

FILED
APR 10 1970
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

October Term, 1969. 1970

No. 1933. 71

SAMUEL J. ABATE, etc., *et al.*,
Petitioners,

v.

PAUL F. MUNDT, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

Petition for Certiorari Filed January 5, 1970.

Certiorari Granted February 24, 1970.

The Rumford Company, Inc., New York, N. Y. 10007—212 732-6076—1970

(3741)

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IN THE

Supreme Court of the United States

SAMUEL J. ABATE, as a Taxpayer of the County of Rockland, and as a Representative of Others Similarly Situated,

and

JUNE MOLOF, MINDY BAKER, GLORIA ENGLISH, JOYCE BRAZILLER, LINDA BERNS and JUDY BARTOSIK, as Individuals and as Representatives of Others Similarly Situated,

and

CORNELIUS T. O'SULLIVAN, ICHABOD S. SCOTT and MICHAEL J. CLARKE,

Petitioners,

against

PAUL F. MUNDT, PHILIP J. ROTELLA, JOHN B. LOVETT, JOHN F. MCALEVEY, HAROLD K. GRUNE, constituting the Board of Supervisors of the County of Rockland, THE COUNTY OF ROCKLAND, and CHARLES FURST and MARION DORSEY, as Commissioners of the Board of Elections of the County of Rockland and THE BOARD OF ELECTIONS OF ROCKLAND COUNTY,

Respondents.

Resolution No. 311 Providing for a Plan of Reapportionment for Rockland County.

WHEREAS, this board has made good faith efforts to comply with the constitutional requirements for equal representation in accordance with the mandate of the Court, and

Resolution No. 311 Providing for a Plan of Reapportionment for Rockland County

WHEREAS, the Charter and Reapportionment Commission appointed by this board has studied various plans of reapportionment for the County of Rockland and has submitted a majority report to this board recommending a multi-member district plan based upon the boundaries of the existing towns within the County, and whereas the legislature of the State of New York by the laws of 1969, Chapter 834, recognized the validity of establishing multi-member districts and also provided that elected town officials could also serve as members of a County legislature, and

WHEREAS, this board is desirous of maintaining the traditional and historical relationship between town and County governments consistent with the constitutional requirement for equal representation, and

WHEREAS, this board in adopting this resolution is complying with the order of the Honorable Joseph F. Hawkins which directed this board to submit a plan of reapportionment to the Court, now, therefore, be it

RESOLVED, that the plan of reapportionment for the County of Rockland set forth hereinafter is adopted and approved subject to implementation by the Court, and be it further

RESOLVED, that the Court is requested to approve such plan and provide for its effective implementation in time for the election of legislators in November of 1969, and be it further

RESOLVED, that the County Attorney is directed to submit this resolution and the plan attached hereto to the Court in compliance with the order of the Court.

Resolution No. 311 Providing for a Plan of Reapportionment for Rockland County

PLAN OF REAPPORTIONMENT FOR THE COUNTY OF ROCKLAND

Section 1. The County Legislature

The County legislature shall be the elective legislative body of the County with all the power and duties of a Board of Supervisors as provided by applicable law. The County legislators, elected from the various districts as more specifically hereinafter set forth, which include the duly elected supervisors of the towns within the County, when lawfully convened, shall constitute the legislature of the County of Rockland.

Section 2. Election and Term of Office of County Legislators

County legislators other than the duly elected supervisors of the towns, shall be elected at the general election held every other odd numbered year, from such districts and in such numbers as hereinafter provided. The term of office of County legislators other than the supervisor of each town shall be four years dating from January first of the year next succeeding their election. The first such election to be at the time of the general election in November of 1969. The supervisors of each town shall be elected as provided by applicable law.

Section 3. Qualifications of County Legislators

County legislators other than the duly elected supervisors of the towns shall be electors of Rockland County and shall have been residents continuously in the County for at least one year preceding their election, and all County legislators shall reside in the district from which

they seek election at the time of their designation for office, and shall continue to be residents of Rockland County and of the district within the County which they represent for the entire term of their office. No County legislator shall be eligible to hold at the same time any other elective Federal, State, County, Town, Village or School District office except for the duly elected supervisors of the towns.

Section 4. Districts

For the purpose of electing County legislators in such numbers as hereinafter provided, Rockland County shall be divided into five districts. All reference to towns apply to that territory wholly contained in each of the towns in the County of Rockland bounded as of January 1, 1969. The districts shall be as follows:

1. District 1 shall consist of the area contained within the boundaries of the Town of Stony Point.

2. District 2 shall consist of the area contained within the boundaries of the Town of Haverstraw.

3. District 3 shall consist of the area contained within the boundaries of the Town of Ramapo.

4. District 4 shall consist of the area within the boundaries of the Town of Clarkstown.

5. District 5 shall consist of the area contained within the boundaries of the Town of Orangetown.

Section 5. Composition of County Legislature

The County legislature shall be composed of the duly elected legislators of each district including the town su-

pervisor. After each official Federal census for the County and prior to the date required for the designation and nomination of candidates, the Board of Elections shall determine and certify the population of the smallest district. Such population will thereupon be established as the average population for each legislator. The Board of Elections shall then apportion the number of legislators among the five county districts on a population basis. The Board of Elections shall divide the average population for each legislator into the population of each district and the whole number thus obtained shall be the number of legislators for each county district together with an additional member for each major fraction, if any, resulting therefrom in each district. The legislators allocated to each district shall be elected from each district as provided herein, except that one of such legislators so allocated to each district shall be the duly elected supervisor of the town contained within such district and shall hold office as a County legislator by virtue of such election to the office of supervisor of the town.

Section 6. Vacancies

A vacancy in the office of County legislator other than a vacancy in the office of supervisor of a town, shall be filled by a majority vote of the members of the Town Board of the town contained within the district from which such legislator was elected, within thirty days after the vacancy has occurred. The person so chosen shall hold office until the commencement of the political year next succeeding the first annual election after the happening of the vacancy, at which election such vacancy shall be filled for the unexpired term. Any vacancy in the office of supervisor of a town shall be filled as required by law.

(Certification omitted in printing.)

Judgment, Dated July 31, 1969, of the Supreme Court of the State of New York at Special Term.

SUPREME COURT OF THE STATE OF NEW YORK.

COUNTY OF ROCKLAND.

SAMUEL J. ABATE, as a Taxpayer of the County of Rockland, and as a Representative of Others Similarly Situated,

Plaintiff,

and

JUNE MOLOF, MINDY BAKER, GLORIA ENGLISH, JOYCE BRAZILLER, LINDA BERNS and JUDY BARTOSIK, as Individuals and as Representatives of Others Similarly Situated,

Plaintiffs-Intervenors,

and

CORNELIUS T. O'SULLIVAN, ICHABOD F. SCOTT and MICHAEL J. CLARKE,

Plaintiffs-Intervenors,

against

PAUL F. MUNDT, PHILIP J. ROTELLA, JOHN B. LOVETT, JOHN F. MCALEVEY, HAROLD K. GRUNE, constituting the Board of Supervisors of the County of Rockland, THE COUNTY OF ROCKLAND, and CHARLES FURST and MARION DORSEY, as Commissioners of the Board of Elections of the County of Rockland and THE BOARD OF ELECTIONS OF ROCKLAND COUNTY,

Defendants.

Index No. 2845/68

Judgment, Dated July 31, 1969, of the Supreme Court of the State of New York at Special Term

The issues in the above entitled action having been brought on regularly to be heard before the Honorable Joseph F. Hawkins, at a Special Term of this Court held in and for the County of Rockland, at the County Court House, New City, Rockland County, New York, on the 9th day of July, 1969, and this matter having been heard by the Court and the Court having retained jurisdiction over this matter pursuant to an order made the 28th day of May, 1969 and entered on June 2, 1969 in the Rockland County Clerk's Office, and the defendants having submitted an affidavit in support of defendants' application for approval of a plan of reapportionment for the County of Rockland made by J. Martin Cornell, sworn to the 8th day of July, 1969, such affidavit having appended thereto Resolution No. 311 of 1969, adopted by the Board of Supervisors of the County of Rockland on the 24th day of June, 1969, containing a plan of reapportionment, and plaintiff having submitted an affirmation by Frank P. Barone, dated July 8, 1969, in opposition to defendants' application, and plaintiffs-intervenors June Molof, *et al.*, having submitted an affidavit by Doris Friedman Ulman in opposition to defendants' application, and plaintiffs-intervenors Cornelius T. O'Sullivan, *et al.*, having submitted an order to show cause dated July 8, 1969, together with an affidavit of Cornelius T. O'Sullivan sworn to the 7th day of July, 1969 and an affidavit of Paul H. Rivet sworn to the 8th day of July, 1969 in opposition to defendants' application, and the Court having granted a motion for said plaintiffs-intervenors Cornelius T. O'Sullivan, *et al.*, to intervene in the within action, and the parties having appeared by counsel, and the issues having been duly heard by this Court, and a decision having been made dated July 21, 1969 by the Honorable Jo-

Judgment, Dated July 31, 1969, of the Supreme Court of the State of New York at Special Term

seph F. Hawkins, approving the defendants proposed plan of reapportionment, with certain modifications and limitations, and the Court having reconsidered a portion of said decision,

Now, on motion of J. Martin Cornell, Attorney for the defendants, it is

ADJUDGED, that the plan of reapportionment adopted by the Board of Supervisors of the County of Rockland, by Resolution No. 311 of 1969, on June 24, 1969, is approved and the legislative body for the County of Rockland shall be the county legislature as provided therein with the following modifications and limitations:

1. There shall be 18 county legislators who shall be elected at the general election to be held on the 4th day of November, 1969.

2. The existing five towns of the County of Rockland are denominated and declared to be county legislative districts and each shall elect to the county legislature, on a district-wide basis, the following number of county legislators respectively at the general election in November of 1969:

District No. 1, Stony Point—One (1) County Legislator
District No. 2, Haverstraw —Two (2) County Legislators
District No. 3, Ramapo —Six (6) County Legislators
District No. 4, Clarkstown —Five (5) County Legislators
District No. 5, Orangetown —Four (4) County Legislators

3. A candidate for both offices of supervisor and county legislator shall stand separately for election to each said office and if elected to both he shall be seated in the county legislature solely by virtue of his election to that body.

Judgment, Dated July 31, 1969, of the Supreme Court of the State of New York at Special Term

4. Vacancies, if any, in the office of county legislator shall be filled by appointment by the county legislature as required by law, and it is further

ADJUDGED, that nominations for the office of county legislator shall be made in accordance with Section 131 (7) of the Election Law and other applicable provisions of law.

Judgment signed this 31st day of July, 1969 at White Plains, New York.

Enter

JOSEPH F. HAWKINS
J. S. C.

Decision of the Hon. Joseph F. Hawkins, Supreme Court of the State of New York at Special Term.

SUPREME COURT OF THE STATE OF NEW YORK.

COUNTY OF ROCKLAND.

SAMUEL J. ABATE, as a Taxpayer of the County of Rockland, and as a Representative of Others Similarly Situated,

Plaintiff.

and

JUNE MOLOF, MINDY BAKER, GLORIA ENGLISH, JOYCE BRAZILLER, LINDA BERNS and JUDY BARTOSIK, as Individuals and as Representatives of Others Similarly Situated,

Plaintiffs-Intervenors,

against

PAUL F. MUNDT, PHILIP J. ROTELLA, JOHN B. LOVETT, JOHN F. MCALEVEY, HAROLD K. GRUNE, constituting the Board of Supervisors of the County of Rockland, THE COUNTY OF ROCKLAND, and CHARLES FURST and MARION DORSEY, as Commissioners of the Board of Elections of the County of Rockland and THE BOARD OF ELECTIONS OF ROCKLAND COUNTY,

Defendants.

Index No. 2845/1968

HAWKINS, J.:

The County of Rockland brings the instant application seeking judicial approval of its proposed plan for the reapportionment or restructuring of the County's legis-

lative branch of government. The proposal is a consequence of this Court's prior ruling on May 12, 1969, disapproving the defendants' previous proposal for an interim plan based upon a "weighted voting" arrangement.

It appears that on that occasion we were unduly sanguine when in demurring from imposing an alternative plan, we noted that judicial intervention is "* * * appropriate only when a legislative body fails to reapportion according to constitutional requisites in a timely fashion after having had an adequate opportunity to do so (cf. *Reynolds v. Sims*, 377 U. S. 533, 586)" and that "* * * events may make it necessary—despite our hopes to the contrary—for the court to impose a plan, as in Town of Greenburgh, *supra*, if the defendants fail to do so."

Alluding again to our prior determination, we there concluded by directing the Board of Supervisors to "* * * present to the court 'with all deliberate speed,' a proposed plan for redistricting and/or reapportionment."

In conformity therewith, a plan has been submitted to which objections are interposed by plaintiff and two intervenors, the League of Women Voters and Cornelius T. O'Sullivan, *et al.* The latter were granted leave to intervene on the morning of the adjourned argument held in connection with the pending motion, but were limited to presenting oral argument and submitting a brief.

There are essentially three decisions which are basic to any court endeavoring to square the circle or seeking an exit from the labyrinth of Rockland County's reapportionment dilemma: *Kirkpatrick v. Preisler*, ... U. S. ...., 89 S. Ct. 1225, and *Wells v. Rockefeller*, ... U. S. ...., 89 S. Ct. 1234, respectively, enjoin legislative bodies to make "good-faith effort to achieve precise mathematical equality. See *Reynolds v. Sims*, 377 U. S. 533, 577 (1964)"

and that there be "* * * equal representation for equal numbers of people" as nearly as is practicable.

It is well to note at this juncture that in the period intervening since our last opinion, the Legislature of the State of New York, by Chapter 834 of the Laws of 1969, enacted the so-called "two hats" bill permitting the same person to occupy two elected offices, that of Supervisor and County Legislator. The said statute also gives legislative sanction for re-apportioning via a multiple-member district plan for electing County Legislators.

Upon the Governor's approving the bill, unfortunately, there was neither message nor memorandum. However, the statute contains a rather complete statement of intent; and upon the Court's initiative, there was made available a "memorandum in support" of the bill prepared by its sponsor, Hon. Edward F. Crawford, Chairman of the Judiciary Committee of the Assembly. In essence, the bill's intent is to give legislative sanction to a variety of re-apportionment plans—some previously held invalid by the courts—and to accord greater flexibility to counties which have to re-apportion. We shall, subsequently, comment further on the statute.

The proponents' plan, we are assured, is the very same plan previously proposed in 1966. Its conceit is to continue and to perpetuate the existing political identities of the five towns which presently constitute the County's body corporate, with each of the said towns to elect a varying number of County Legislators dependent upon their respective populations. The minimum or base population figure for each such representative is derived from the census for the least populous town, to wit, the Town of Stony Point whose population as most recently extrapolated is 11,704. There would thus be allotted one (1) County Legislator to Stony Point, and the Town of

Ramapo—the most populous, with some 73,051 persons—allocated six (6) representatives, resulting in a total of eighteen (18) to be elected.

The proposal continues the office of Town Supervisor, providing for each town to have a Supervisor. The basis for the changes in said latter office derives from the recent statute previously referred to (Ch. 834, L. [illegible], whereby the same individual may be "elected" to two offices, i. e., County Legislator and Town Supervisor. The County Legislature is to be composed of the Legislators of each Town-District, including the Town Supervisor; but "* * * one of such legislators so allocated to each district shall be the duly elected supervisor of the town contained within such district and shall hold office as a County legislator by virtue of such election to the office of supervisor of the town." (§5)

Thus, one successful candidate in each of the said five towns who is elected Supervisor would automatically be elected a County Legislator. The terms of said offices, however, are not concurrent for the Supervisors would serve for only a two-year term whereas the County Legislators would hold office for four years. Further, a vacancy in the office of a non-Supervisor County Legislator would be "filled by a majority vote of the members of the Town Board of the town contained within the district from which such Legislator was elected." (§6)

Again we note the caveat of the late Mr. Justice Felix Frankfurter that the Supreme Court, in *Baker v. Carr*, 369 U. S. 186, 268, was creating "a mathematical quagmire" without providing the corollary "legal calculus".

As for the matter at bar, we believe—as shall be more fully explained hereinafter—that the precise percentage variations in either a multi-member as against a single-member plan are of minimal importance for the initial

root problem which has to be resolved is whether there is an insuperable constitutional barrier—temporary or permanent—to the multiple-member district technique of electing local legislators.

Further confronting this court is the rather inexorable political time-table. Assuming, but without so deciding, that there is greater legal merit to the intervenors' proposals for single-member districts, there are the myriad and complex problems involved should the court attempt plastic surgery by severing Rockland County into some eighteen separate, equal and complete districts. Despite the parties and the intervenors having had several years within which to prepare a map keyed to a single-district plan, none has been presented which the court could employ, if so minded, to delineate the requisite individual districts if, indeed, the single-member district plan is the only viable constitutional recourse.

Respecting the constitutionality of the "two hats" statute, we find no need to rule thereon since in determining the within motion, we can rely on the presumption of constitutionality—however elastic. Its intent and purpose are quite clear—and we are not without judicial conversance in this area since the statute obviously was intended, in part, to overcome our holding in *Matter of Brayman v. Stevens*, 54 Misc. 2d 974, aff'd 28 A. D. 2d 1095, and by the Court of Appeals in 20 N. Y. 2d 868, which barred a candidate from simultaneously running for both offices of Supervisor and County Representative. It may well be that the legislation validly achieves such purpose of permitting the same person to run for the two offices at the same election; but it neither provides nor sanctions the proposal at bar whereby a candidate by winning one office is automatically or, as it were, by operation of law, thereby elected to yet another office. The statute, as we construe it, is permissive, i. e., "a

plan of apportionment * * * may provide * * * that supervisors of towns * * * shall be eligible to be elected as members of the county legislative body," (§2[b]) but "election" means garnering the most votes for a particular office. It, therefore, follows that a Town Supervisor may be elected to both said offices at the same election; but he will have to run separately for each office.

It is quite conceivable—and assuredly the electors should be given such electoral option—to reject a candidate as a Supervisor but, nevertheless, to elect him to the office of County Legislator. To do otherwise is to change the statute's sobriquet from the "two hats" bill to "Hobson's Choice", particularly where a district is entitled to only one County Legislator. The statute's language—"eligible for election"—imports running for each particular office. The fortunate candidate so elected may, indeed, wear two hats, à la Pooh-Bah; but he will have to acquire them by contest, not by grace.

We note that the County places great reliance upon Mr. Justice Dillon's opinion in *Town of Greenburgh, et al., v. Board of Supervisors of Westchester County*, 298 N. Y. S. 2d 615, which was most recently affirmed by the Court of Appeals, ... N. Y. 2d .... (6/16/69), wherein he selected from three proposals a single-member district plan with modifications he engrafted. The language seized upon the County respecting the validity of a multiple-member district plan (Greenburgh Plan) constitutes dicta since, although observing that it had "good features", it was not approved by that court.

It ineluctably follows from the foregoing that the proposed plan for reapportioning Rockland County cannot be approved *in toto;* but it is equally inescapable that the re-apportionment of Rockland County has been too long delayed. Courts have approved less than ideally acceptable plans, as in *Town of Greenburgh, supra*, de-

spite reservations or qualms. (See, also, *Duquette v. Board of Supervisors of the County of Franklin*, 32 A. D. 2d 706 [1]).

It is the court's holding that the defendants' proposed plan for reapportionment is approved, but with the following modifications and limitations:

[1] The County Legislature is to be comprised of nineteen (19) County Legislators who shall be elected at the coming general election to be held on the 4th day of November, 1969.

[2] The existing five (5) towns of Rockland County are denominated and declared to be "County Legislative Districts", and each shall elect to the County Legislature on a district-wide basis the following number of County Legislators, respectively:

District No. 1, Stony Point—one (1) County Legislator
District No. 2, Haverstraw—two (2) County Legislators
District No. 3, Ramapo—seven (7) County Legislators
District No. 4, Clarkstown—five (5) County Legislators
District No. 5, Orangetown—four (4) County Legislators,

thereby constituting a total legislative body of nineteen (19) members.

The within modification of adding one additional County Legislator to the representation from the Town of Ramapo (District No. 3) is prompted by several considerations. A legislative body containing an even number of members which has no provision for a presiding officer casting a vote so as to break a tie vote invites a legislative impasse; that not too improbable eventuality is thereby eliminated.

There is a further and perhaps greater stimulus for so doing. We decline to participate in what may be characterized as a "numbers game", i. e., what are the

precise permissible percentile variations in population per Legislator, or what is an acceptable arithmetical differential between the "largest to smallest population per Legislator?" Is it, as contended by the proponents, in the ratio of "1.13 to 1", or, rather, twelve (12%) per cent as urged by the objector? (The latter, incidentally, is more nearly correct, for if one district is "7.1% under represented" and another is "2.5% over represented," this makes for a total differential of 9.6%).

The solution seems simple: by adding one Legislator to the most grievously under-represented district, we thereby diminish the inequality; and, we also provide the tie-breaking vote. Employing the County's figures of a total County population of 218,804, and dividing by 19, in lieu of the proposed 18, yields, by sheer serendipity, an exact quotient of 11,516 souls per legislator, per district—and the smallest town's population, that of Stony Point, is 12,114. It is true that Ramapo thereby acquires an additional Legislator on a 10,426 per persons basis; but no fairer arithmetical recourse is available unless the number of Legislators is doubled or trebled.

[3] A candidate for both offices of Supervisor and County Legislator will have to stand separately for election to each said office; and if elected to both, he shall be seated in the County Legislature solely by virtue of his election to that body. The instant conversion of each Supervisor into a County Legislator, but with a different term of office, paraphrasing George Orwell's oft-quoted aphorism, in "*Animal Farm*", is to declare that "all County Legislators are equal; only some are more equal than others."

[4] Vacancies, if any, in the office of County Legislator, as in *Town of Greenburgh, supra*, shall be filled by "appointment" by the County Legislature and not by the

particular Town Board of the Town which elected the Legislator to be replaced.

We wish to note and to commend the County Attorney and counsel for the League of Women Voters for their excellent comprehensive briefs and oral argument.

The defendants' application is granted to the extent hereinbefore noted. No costs.

Submit judgment on notice.

Dated: July 21, 1969

JOSEPH F. HAWKINS
J. S. C.

Appearances:

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Modified Decision of the Hon. Joseph F. Hawkins, Supreme Court of the State of New York at Special Term.

SUPREME COURT OF THE STATE OF NEW YORK.

COUNTY OF ROCKLAND.

SAMUEL J. ABATE, etc.,

Plaintiff,

and

JUNE MOLOF, *et al.*,

Plaintiffs-Intervenors,

against

PAUL F. MUNDT, *et al.*,

Defendants.

Index No. 2845/1968

HAWKINS, J.:

Subsequent to the decision herein, dated July 21, 1969, the court's attention has been directed to the effect of adding one additional County Legislator to the representation from the Town of Ramapo. The court has erred in its mathematics and, upon reconsideration, finds this modification creates a thirteen (13%) per cent differential favoring the Town of Orangetown. Comparing the Towns of Ramapo and Orangetown, without giving due consideration to the effects upon the population averages and the resulting variations of percentages in all districts, leads to an undesired result. If it is sought to

implement the original intent, a greater number of legislators would have to be authorized, and this should not be imposed at this time. While the considerations set forth on behalf of the modification remain valid, the untoward mathematical conclusion requires the court to withdraw its statement that "the solution seems simple."

Additionally, it appears that the court was unduly solicitous that a possible legislative stalemate could result from an even numbered total membership in the County Legislature. Thus, there is added cause for keeping the representation for Ramapo to a total of six (6) County Legislators as originally proposed by the County of Rockland.

Accordingly, the court on its own motion, modifies its opinion of July 21, 1969, so that item [1], on pg. 6, shall provide that the County Legislature be comprised of eighteen (18) County Legislators in lieu of "nineteen (19) County Legislators"; and item [2], first paragraph on pg. 7, shall read: "District No. 3, Ramapo"—six (6) County Legislators in lieu of "seven (7) County Legislators." Except as hereinabove amended, the opinion of July 21, 1969, stands.

So ordered.

Dated: July 30, 1969

JOSEPH F. HAWKINS
J. S. C.

Modified Decision of the Hon. Joseph F. Hawkins. Supreme Court of the State of New York at Special Term

Appearances:

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Order, Dated August 26, 1969, of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on August 26, 1969

Hon. George J. Beldock,
Presiding Justice.
Hon. Arthur D. Brennan,
Hon. Samuel Rabin,
Hon. Fred J. Munder,
Hon. Philip M. Kleinfeld,
Associate Justices.

SAMUEL J. ABATE, etc.,

Plaintiff-Appellant-Respondent,

and

JUNE MOLOF, *et al.*,

Plaintiffs-Intervenors-Appellants-Respondents,

v.

PAUL F. MUNDT, *et al.*,

Defendants-Respondents-Appellants.

In the above entitled cause, the above named Samuel Abate, plaintiff, June Molof, *et al.*, plaintiffs-intervenors, Cornelius T. O'Sullivan, *et al.*, plaintiffs-intervenors having appealed to this court from a judgment of the Supreme

Order, Dated August 26, 1969, of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department

Court, Rockland County entered July 31, 1969 and the above named Paul F. Mundt, *et al.* having also appealed from so much of said judgment as provided that a candidate for both offices of supervisor and county legislator shall stand separately for election to each said office and if elected to both he shall be seated in the county legislature solely by virtue of his election to that body and the said appeal having been argued by Frank P. Barone, of counsel for the plaintiff-appellant-respondent, by J. Martin Cornell, of counsel for the defendants-respondents-appellants, by Mrs. Doris Friedman Ulman, of counsel for the plaintiffs-intervenors-appellants-respondents Molof, *et al.*, and by Paul Rivet, of counsel for the plaintiffs-intervenors-appellants-respondents O'Sullivan, *et al.*, and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby affirmed, without costs.

Brennan, Rabin, Munder and Kleinfeld, JJ., concur.

Beldock, P.J. dissents in separate opinion and votes to modify the judgment in accordance therewith.

Enter:

HERMAN M. POGUL
Clerk of the Appellate Division

(Certification omitted in printing.)

Decision of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department.

1141 AE. Samuel J. Abate, etc., plaintiff-appellant-respondent, and June Molof, *et al.*, plaintiffs-intervenors-appellants-respondents, v. Paul F. Mundt, *et al.*, defendants-respondents-appellants.

Judgment of the Supreme Court, Rockland County, entered July 31, 1969, affirmed, without costs, insofar as appealed from.

Brennan, Rabin, Munder and Kleinfeld, JJ., concur.

Beldock, P.J. dissents in separate opinion and votes to modify the judgment in accordance therewith.

August 26, 1969

ABATE v. MUNDT—1141 AE.

Dissent of the Hon. George J. Beldock, Presiding Justice of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department.

SUPREME COURT,

APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT.

Beldock, P.J., Brennan, Rabin, Munder and Kleinfeld, JJ.

SAMUEL J. ABATE, etc.,

Plaintiff-Appellant-Respondent,

and

JUNE MOLOF, *et al.*,

Plaintiffs-Intervenors-Appellants-Respondents,

against

PAUL F. MUNDT, *et al.*,

Defendants-Respondents-Appellants.

BELDOCK, P.J. (dissenting):

On this appeal, we have been called upon to determine the validity of the multi-member district reapportionment plan for the new County Legislature proposed by the Board of Supervisors of the County of Rockland. A subsidiary question is whether an individual elected as a town supervisor may automatically serve as a county legislator without standing separately for election to the legislative post. Special Term and a majority of this

Court has approved the reapportionment plan but has held that a candidate for the offices of both supervisor and county legislator must seek election to each post separately. I agree with this determination in part only. In my opinion, the reapportionment plan is unconstitutional.

The proposed reapportionment plan seeks to implement the "one man, one vote" principle by dividing the County into five election districts, the boundaries of which are coterminous with the boundaries of the five towns in Rockland County, and by apportioning a varying number of elective positions to each district, depending upon its population. The following chart adequately displays the mathematics of the plan:

District	Legislators	Population	Population per Legislator
No. 1 Stony Point	1	12,114	12,114
No. 2 Haverstraw	2	23,676	11,838
No. 3 Ramapo	6	73,051	12,175
No. 4 Clarkstown	5	57,883	11,577
No. 5 Orangetown	4	52,080	13,020
	18	218,804	

The result of this allotment is that Orangetown is under-represented by 7.1% and that Clarkstown is over-represented by 4.8%.* This yields a maximum variance of 11.9%.

Two recent United States Supreme Court decisions (*Kirkpatrick v. Preisler*, 394 U. S. 526 and *Wells v.*

*The average population per legislator is 12,156. Thus, Stony Point is over-represented by 0.3%; Haverstraw is over-represented by 2.5% and Ramapo is under-represented by 0.2%.

Rockefeller, 394 U. S. 542) have cast considerable doubt upon the heretofore-assumed validity of reapportionment plans which managed to achieve *de minimis* variations but which fell short of exact mathematical equality. In the *Kirkpatrick* and *Wells* cases, the court struck down single-member Congressional reapportionment plans with variances of 5.97% and 13.1% respectively. At bar, we are faced with a variance of 11.9% in a multi-member scheme involving a county legislature. In *Town of Greenburgh v. Board of Supervisors*, 32 A. D. 2d 892, affd. 25 N. Y. 2d .... [decided June 16, 1969], the Court of Appeals concurred in our approval of Westchester's single-member district plan with a maximum variance of 12.8%. I reject, however, the suggestion that, because the variance here is 11.9%, the approval of Westchester's reapportionment plan in the *Town of Greenburgh* case automatically brings the plan at bar within the ambit of constitutional standards. In my opinion, the reasoning of the *Kirkpatrick* and *Wells* cases is decisive of this appeal and we cannot justify an affirmance here solely upon the mathematics of *Town of Greenburgh*. In *Kirkpatrick*, *supra*, the court stated:

> "We reject Missouri's argument that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the 'as nearly as practicable' standard. The whole thrust of the 'as nearly as practicable' approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case. The extent to which equality may practicably be achieved may differ from State to State and from district to district. Since 'equal representation for equal num-

> bers of people [is] the fundamental goal for the House of Representatives,' *Wesberry v. Sanders, supra,* at 18, the 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality. See *Reynolds v. Sims,* 377 U. S. 533, 577 (1964). *Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small.*" (*Kirkpatrick v. Preisler, supra,* at 530-531.) (Emphasis supplied.)

The force of this statement is not diminished because of the circumstance that the court in *Kirkpatrick* was dealing with Congressional as opposed to inter-state reapportionment (see *Reynolds v. Sims,* 377 U. S. 533; *Wells v. Rockefeller, supra,* at 554 [White, J. dissenting]), nor that it was concerned with a single member as opposed to a multi-member district plan (see *Burns v. Richardson,* 384 U. S. 73; *Swann v. Adams,* 385 U. S. 440; *Kilgarlin v. Hill,* 386 U. S. 120). In light of the *Kirkpatrick* and *Wells* cases, these distinctions are essentially meaningless in the context of the one man, one vote principle; particularly so, where, as here, we are dealing with a unicameral legislature.

This appeal, therefore, must be dealt with in terms of the justification offered for the variance. We should not content ourselves with the happenstance that the variance in this case is less than in some other case. Notwithstanding the long history of Rockland County's attempts to reapportion, and the particular problems that the county faces, I believe that the variance has not been adequately justified. Indeed, defendants' argument on appeal makes little attempt at justification. The thrust of defendants' position on appeal (aside from arguing

the abstract acceptability of a multi-member districting plan) is that the variance is *de minimis*. This argument is predicated on language in the *Reynolds* and *Swann* cases to the effect that *de minimis* variances will be accepted provided that a rational state policy underlies the basis for the variances. It seems to me, though, that the *Wells* and *Kirkpatrick* cases provide the guidelines for determining rationality. In justification of the variance, the defendants lay stress on the plan's use of existing town lines. This reasoning, however, was rejected by the court in *Wells v. Rockefeller, supra*, where New York sought to justify variances by pointing to the maintenance of county lines. The court stated:

> "* * * New York tries to justify its scheme of constructing equal districts only within each of seven sub-states as a means to keep regions with distinct interests intact. But we made clear in *Kirkpatrick* that 'to accept population variances, large or small, in order to create districts with specific interest orientations is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people.'" (*Wells v. Rockefeller, supra*, at 546.)

Defendants' counter-argument that the use of town lines is an obstacle to gerrymandering was met by the court in *Kirkpatrick*:

> "The State's interest in constructing congressional districts in this manner, it is suggested, is to minimize the opportunities for partisan gerrymandering. But an argument that deviations from equality are justified in order to inhibit legislators from engaging in partisan gerrymandering is no more than a variant of the argument, already

> rejected, that considerations of practical politics can justify population disparities." (*Kirkpatrick v. Preisler, supra,* at 534.) [footnote omitted]

In sum, it seems clear that no attempt has been made to achieve a mathematical balance within the standards set forth by the Supreme Court. The plan at bar merely seeks to achieve the best apportionment against the preconceived notion that the towns must stay intact—a notion which has been rejected by the Supreme Court in its latest pronouncements.

Though I believe that the within plan is unconstitutional, I would not recommend that it be disapproved. Because the last day for filing nominating certifications is imminent (September 5th), I feel that our unreserved disapproval, for obvious reasons, would be ill-advised (see, *Kilgarlin v. Hill,* 386 U. S. 120, 121; *Martin v. Bush,* 376 U. S. 222, 223). Accordingly, I would modify the judgment only to the extent of directing that a new reapportionment plan be submitted after the election of November 4th.

August 26, 1969

Order, Dated October 8, 1969, of the Court of Appeals of New York.

COURT OF APPEALS.

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 8th. day of October in the year of our Lord one thousand nine hundred and sixty-nine, before the Judges of said Court.

WITNESS.

THE HON. STANLEY H. FULD,
Chief Judge, Presiding.
RAYMOND J. CANNON,
Clerk.

Remittitur October 8, 1969.

2. No. 428. 69

SAMUEL J. ABATE,

Plaintiff-Appellant-Respondent,

JUNE MOLOF & ors., & c.,

Plaintiffs-Intervenors-Appellants-Respondents,

and

CORNELIUS T. O'SULLIVAN, & ors.,

Plaintiffs-Intervenors-Appellants-Respondents,

vs.

PAUL F. MUNDT, & ors., & c.,

Defendants-Respondents-Appellants.

Order, Dated October 8, 1969, of the Court of Appeals of New York

BE IT REMEMBERED, That on the 17th. day of September in the year of our Lord one thousand nine hundred and sixty-nine, Samuel J. Abate, the plaintiff-appellant-respondent, and June Molof, & ors., &c., and Cornelius T. O'Sullivan, & ors., the plaintiffs-intervenors-appellants-respondents, in this cause, came here unto the Court of Appeals, by Barr & Barone, Doris Friedman Ulman, and Paul H. Rivet, their attorneys, and filed in the said Court Notices of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Paul F. Mundt, & ors., &c., the defendants-respondents-appellants in said cause, afterwards appeared in said Court of Appeals by J. Martin Cornell, their attorney, and also filed a Notice of Appeal.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Frank P. Barone, of counsel for the appellant-respondent, and by Mrs. Doris Friedman Ulman and Mr. John F. Banzhaf, III, of counsel for the intervenors Molof, & ors., and by Mr. Paul H. Rivet, of counsel for the intervenors O'Sullivan, & ors., and by Mr. J. Martin Cornell, of counsel for the respondents-appellants, and by Mr. Robert Imrie, of counsel for the Attorney General of the State of New York, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Order, Dated October 8, 1969, of the Court of Appeals of New York

THEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the
State of New York.

Court of Appeals, Clerk's Office,
Albany, October 8, 1969.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

(Seal.)

Decision and Opinion of the Court of Appeals of New York.

STATE OF NEW YORK

COURT OF APPEALS.

2. No. 428. 69

SAMUEL J. ABATE,

Plaintiff-Appellant-Respondent,

and

JUNE MOLOF & ors., & c.,

Plaintiffs-Intervenors-Appellants-Respondents,

and

CORNELIUS T. O'SULLIVAN, & ors.,

Plaintiffs-Intervenors-Appellants-Respondents,

vs.

PAUL F. MUNDT, & ors., & c.,

Defendants-Respondents-Appellants.

BURKE, J.:

Rockland County is presently governed by a Board of Supervisors, consisting of the Supervisors of each of the County's five constituent towns. In early 1966, a federal district court, upon its finding that the Board was malapportioned, ordered that a plan be devised which would satisfy the requirements of the Equal Pro-

tection Clause and that such plan be submitted to the voters of the County for their approval. (*Lodico v. Board of Supervisors*, 256 F. Supp. 442) Pursuant to that order, three plans were devised and submitted to the voters but were rejected at the polls.

In September, 1968, the present action was brought to compel the Board to reapportion in accordance with constitutional requirements. In response, the Board submitted a weighted voting scheme as an interim measure but, upon the plaintiffs' motion, that plan was rejected at Special Term. The Board then devised and submitted the plan approved in the courts below, which is the subject of the present appeal.

The plan as adopted provides for a County legislature composed, on the basis of the population of the County as of 1969, of eighteen members chosen from five districts which correspond to the County's five constituent towns. Each district is assigned its legislators according to the district's population in relation to the population of the smallest district. The smallest district, Stony Point, has a population of 12,114 and is assigned one representative in the County legislature. The number of representatives to be assigned to each of the other districts is determined by dividing the population of each by the population of the base district, Stony Point, the number of representatives being the whole number resulting from that computation, plus any major fraction. The result in tabular form is as follows:

District	Population	No. of Representatives
Stony Point	12,114	1
Haverstraw	23,676	2
Orangetown	52,080	4
Clarkstown	57,883	5
Ramapo	73,051	6

Each representative is to be elected at large within the district so that each district other than Stony Point will be a multi-member district. Since the population of none of the other districts is an exact multiple of the population of Stony Point, there is some variation among districts in terms of the population per legislator, with the result that Stony Point is 0.3% "over-represented," Haverstraw is 2.5% "over-represented," Orangetown is 7.1% "under-represented," Clarkstown is 4.8% "over-represented," and Ramapo is 0.2% "under-represented." The plaintiffs attack the plan both on the ground that the Board has made no attempt at achieving equality of representation in terms of population and on the ground that the utilization of multi-member districts is inherently defective. In addition, the plaintiffs attacked the so-called "two hats" provision of the plan under which each Town Supervisor, by virtue of his election to that office, would also automatically become a member of the County legislature.

Special Term approved the apportionment plan but modified the "two hats" provision so as to require that Town Supervisors, if they wish to hold seats in the County legislature, must stand separately for election to that office. The Appellate Division, Second Department affirmed that determination without opinion, with one justice dissenting on the ground that the plan merely sought to achieve the best apportionment possible in terms of the maintenance of existing town lines. We, in turn, affirm the order of the Appellate Division.

I

It is, of course, true that the "one man-one vote" principle enunciated in *Reynolds v. Sims* (377 U. S. 533) is applicable to local legislative bodies as well as to state

legislatures (*Avery v. Midland County*, 390 U. S. 474, 481). Under the principles set forth for the purpose of determining whether a particular plan of apportionment meets the requirements of the Equal Protection Clause, the question is whether the plan before us adequately apportions representatives on a population basis. However, the issue is not to be resolved merely in terms of a sterile mathematical exercise:

> "[T]he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts * * * as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each has an identical number of residents, or citizens or voters. *Mathematical exactness or precision is hardly a workable constitutional requirement.*" (*Reynolds v. Sims, supra*, at 577 [emphasis added])

Thus, the mere fact that there is a variation of 13% in the number of people per legislator under the present plan is not of itself sufficient to render the plan constitutionally defective (*Roman v. Sincock*, 377 U. S. 695, 711; *Kirkpatrick v. Preisler*, 394 U. S. 526, 530; *Town of Greenburgh v. Board of Supervisors*, 25 N. Y. 2d 818). We must, therefore, in light of the particular circumstances of this case, determine whether the County has made a good faith effort to achieve equality of representation and whether there is sufficient justification for any variance from absolute equality. On this point, it should be recognized that the "one-man, one-vote" cases have involved at least three levels of legislative reapportionment and that, in dealing with each of these levels, there are quite properly taken into account and weighed in the balance different considerations both as

to the permissible variations from strict equality and as to the justification for variations from such strict equality. The United States Supreme Court decisions indicate that, in regard to apportionment of congressional districts, the permissible variation from strict equality is indeed almost micrometric and the justification required for such deviation is correspondingly stringent (See *Wesberry v. Sanders*, 376 U. S. 1; *Kirkpatrick v. Preisler*, 394 U. S. 526; *Wells v. Rockefeller*, 394 U. S. 542). Decisions dealing with apportionment of state legislatures tend to reflect a broader scope for permissible deviations and a more tolerant attitude toward the practical justification for deviations (See *Fortson v. Dorsey*, 379 U. S. 433, 437; *Burns v. Richardson*, 384 U. S. 73; *Swann v. Adams*, 385 U. S. 440). Similarly, and of particular relevance on this appeal, the Court has indicated a willingness to allow a still broader scope for permissible deviations from strict population equality and the justification for such deviations when dealing with local, intra-state legislative bodies (See *Sailors v. Board of Educ.*, 387 U. S. 105; *Dusch v. Davis*, 387 U. S. 112; *Blaikie v. Wagner*, 285 F. Supp. 364).

In light of this apparent difference in treatment, it seems clear that we may find the population variance here to be within permissible limits (See *Town of Greenburgh v. Board of Supervisors*, 25 N. Y. 2d 817) and the practical and historical justification for the variance to be sufficient. What the plan does is *not* to ignore population equality, but rather to achieve substantial equality within the context of a long-established town government framework, thus accommodating both constitutional and practical considerations (See *Jackman v. Bodine*, 53 N. J. 585, 252 A. 2d 209, *cert. den.* 38 U. S. L. W. 3120 [10/14/69]). It represents a balanced, *bona fide* application of the "one-man, one-vote"

principle to the needs and circumstances of local government. As such, it comes within the ambit of the Supreme Court's declaration "that variations from a pure population standard might be justified by such state policy considerations as the *integrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts or the recognition of natural or historical boundary lines*" (*Swann v. Adams*, 385 U. S. 440, 444 [emphasis added]) and the declaration that the recognition of such factors in devising an apportionment scheme is permissible so long as they "are free of any taint of arbitrariness or discrimination." (*Roman v. Sincock*, 377 U. S. 695, 710) We therefore reject the contention that the plan before us is constitutionally defective because of the minor population variance involved.

It is also contended that the plan's incorporation of multi-member districts necessarily indicates a constitutional defect. However, the contention flies in the face of the decision in *Fortson v. Dorsey* (379 U. S. 433) in which the Court held that multi-member districts, drawn substantially along existing county lines, are constitutionally permissible so long as the vote of each voter is "approximately equal in weight to the vote of any other citizen in the State." (379 U. S. at 438) As with Fulton County, Georgia, in *Fortson*, the population of the Ramapo district in this case is approximately six times larger than that of Stony Point, a single-member constituency, and for that reason Ramapo elects six representatives. According to the reasoning of that opinion, such a multi-member district device is permissible since each voter in Ramapo votes for six representatives to represent his interests in the County legislature and, if the weight of the vote of any voter in Ramapo, when he votes for six representatives, is not

the *exact* equivalent of that of a resident of a single-member district, we cannot say that his vote is not approximately equal in weight to that of any other citizen in the County (379 U. S. at 437-438). That conclusion also adequately disposes of any claimed deficiency in such a plan based upon speculative mathematical analysis of such things as the "effectiveness" of actual representation. Indeed, as long as the basic population requirements of *Reynolds v. Sims* are met, and we hold that the Rockland County plan does meet those fundamental requirements, the use of multi-member districts "will constitute an invidious discrimination only if it can be shown that 'designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of a racial or political element of the voting population.'" (*Burns v. Richardson*, 384 U. S. 73, 88). No such showing has been made as to the plan under attack in this case. We therefore hold that the Rockland County Apportionment plan is constitutional.

II

The plan as adopted also contained a so-called "two hats" provision by which the person elected to the office of Town Supervisor of each of the five towns would automatically be entitled to a seat in the county legislature. Special Term modified this provision of the plan so as to require that, if a Town Supervisor also wished to hold a seat as a County legislator, he must be elected separately to the latter position. We affirm that determination. Town Supervisors are eligible to sit as members of County legislatures by virtue of the recently amended Section 10 of the Municipal Home Rule Law (L. 1969, ch. 834) which provides, in perti-

nent part, that "a plan of apportionment adopted by a county * * * may provide * * * supervisors of towns * * * shall be *eligible to be elected* as members of the county legislative body." (Emphasis added) The use of the term "elected" must be taken as indicating an intention on the part of the legislature that a town supervisor could serve as a county legislator only if he prevailed in an election for the office of county legislator. Although it is true that we held in *Matter of Braymen v. Stevens* (20 N. Y. 2d 868) that Section 411 of the County Law prohibited a county officer from serving as a town supervisor, that decision antedated the enactment of Section 10(13) (b) of the Municipal Home Rule Law with which it is obviously inconsistent. Under familiar principles of statutory construction, the conflict between these provisions must be resolved by holding that the latter section impliedly repealed the former insofar as they are inconsistent, with the result that the latter is controlling. Special Term therefore properly determined that the plan should be modified to the extent indicated above.

Accordingly, the order of the Appellate Division, Second Department should be affirmed.

Dissent of the Hon. Stanley H. Fuld, Chief Judge of the Court of Appeals of New York, and the Hon. Matthew J. Jasen, Associate Judge of the Court of Appeals of New York.

COURT OF APPEALS.

SAMUEL J. ABATE, as a Taxpayer, etc.,

Plaintiff-Appellant,

and

JUNE MOLOF, *et al.*,

Plaintiffs-Intervenors-Appellants,

against

PAUL F. MUNDT, *et al.*, constituting the Board of Supervisors,

Defendants-Respondents-Appellants.

FULD, Ch. J. (dissenting in part):

I agree that the Municipal Home Rule Law (§10[13][b]) permits a town supervisor to serve on the county legislature and requires that he stand separately for election to that body. I cannot, however, subscribe to the court's decision that the reapportionment plan adopted by the board in this case satisfies the demands of the Equal Protection Clause. In my view, the apportionment standards which apply to the states also apply to municipalities —e. g., counties, cities and towns—which exercise general governmental functions.

As the court's opinion indicates, Rockland County's proposal provides that each of its five towns shall constitute a legislative district. Using the smallest town, Stony Point, as a base, it accords each of the other four

towns additional seats in the county legislature in an amount determined by dividing their populations by that of Stony Point and rounding off the result to the nearest whole number. Following this year's election under the plan, Orangetown's legislators will represent 13% more people than those from Clarkstown, even though each would be accorded the same vote in the county legislature.

There is no doubt that, in passing on a plan of apportionment, we are governed by the "one man, one vote" principle laid down in *Reynolds v. Sims* (377 U. S. 533) and in the cases which followed it. The majority asserts, however, that the strictures of that principle vary and are to be applied differently depending on the "level of legislative apportionment" involved (Opinion, p. 3). More specifically, it is stated that, although the permissible variation in population between congressional districts is "almost micrometric," there is a somewhat "broader scope for permissible deviations" in the apportionment of state legislatures and a "still broader scope" where the plan involves "local, intra-state legislative bodies" (Opinion, p. 4).

Significantly, though, the opinion furnishes not a single reason which would justify such a differentiation, and I suggest that there is no basis either in logic or precedent for the distinction sought to be drawn. On the contrary, the very same rationale which requires that all votes be accorded equal weight in elections to Congress and state legislatures demands rigorous adherence to the one man, one vote principle in a county-wide election of its legislative body. A resident and voter is undoubtedly concerned with the actions of his county or municipal legislature, as he is with those of Congress or the state legisla-

ture. There is no reason in either case why a citizen's voting power—his ability to influence the outcome of the election—should depend upon the district in which he happens to live. There is, as the Supreme Court observed in *Avery v. Midland County* (390 U. S. 474, 481), "little difference, in terms of the application of the Equal Protection Clause and the principles of *Reynolds v. Sims*, between the exercise of state power through [state] legislatures and its exercise by elected officials in the cities, towns, and counties." Indeed, in *Seaman v. Fedourich* (16 N. Y. 2d 94) and in *Iannucci v. Board of Supervisors* (20 N. Y. 2d 244)—both of which antedated the Supreme Court's decision in the *Avery* case—our court expressly held that the *Reynolds* principle applies to "elective legislative bodies exercising general governmental powers at the municipal level" (16 N. Y. 2d, at p. 101; 20 N. Y. 2d, at p. 249) and rejected proposals for legislative apportionment on the county and municipal levels which failed to accord equality of representation. (See, also, *Honig v. Board of Supervisors*, 24 N. Y. 2d 861.)

In support of its conclusion that a lower standard of equality applies to elections of representatives to local legislative bodies, the court relies on two Supreme Court decisions—*Sailors v. Board of Education* (387 U. S. 105) and *Dusch v. Davis* (387 U. S. 112)—in which plans for the structuring of local governments were upheld. These cases are, however, totally inapposite. *Sailors v. Board of Education*, for instance, involved a scheme for the *appointment of nonlegislative officials* and was not at all concerned with legislative apportionment; and, in the *Dusch* case, all of the legislators were to be elected *at large* and districts (or, more precisely, boroughs) were to

be used "merely as a basis of residence for candidates, not for voting or representation" (387 U. S., at p. 116).[1]

These cases do, it is true, recognize the need for innovation and flexibility in the *organization* of local governments but there is nothing in the decisions which implies that, in drawing electoral districts for legislative office, it is permissible to accord the votes of citizens living in one area greater weight than is accorded the votes of citizens in another area. "Diluting the weight of votes because of place of residence," the Supreme Court noted in *Reynolds* (377 U. S. 533, 566, *supra*), "impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discrimination based upon factors such as race [case cited] or economic status [case cited]."

In considering the plan before us, I find it difficult, if not impossible, to accept the majority's characterization of the 13% deviation infecting the proposed plan as a "minor population variance" (Opinion, p. 5). I recognize, of course, that mathematical exactness or precision is not always possible and that the test to be applied in determining the validity of a plan is not *solely* the size of the percentage deviation. Nevertheless, an attempt must be made to keep that deviation to a minimum. As I read the relevant cases, the significant and operative consideration is whether the plan under review reflects such an effort to achieve, "as nearly * * * as is practicable," equality of representation. (*Reynolds v. Sims*, 377 U. S. 533, 577, *supra*; see *Kirkpatrick v. Preisler*, 394 U. S. 526, 531.) As the court declared in the *Kirkpatrick* case,

[1]Indeed, the court pointed out that, "If a borough's resident on the counsel represented in fact only the borough, residence being only a front, different conclusions might follow" (387 U. S., at p. 116).

legislative districts must be drawn to allow "only limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which a justification is shown." (*Kirkpatrick v. Preisler*, 394 U. S. 526, 531, *supra*.)

It is the court's position that, despite the deviation population which the plan creates, factors other than population are equally significant and that the proposal represents a "*bona fide* application of the 'one man, one vote' principle to the needs and circumstances of local governments" which satisfies constitutional requirements (Opinion, p. 4). This, it seems to me, misconceives the meaning of the phrase, "good-faith effort," found in the cases. Even if one were to accept the majority's premise that the demands of the Equal Protection Clause may be relaxed in dealing with a county apportionment plan, nevertheless, the simple fact remains that "[p]opulation is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies." (*Reynolds v. Sims*, 377 U. S. 533, 567, *supra*.)

In the present case, population was neither "the starting point" nor "the controlling criterion." It is undisputed and indisputable that the board's sole consideration in fixing legislative districts was the preservation of existing town lines. It was only *after* the districts had been created and its lines fixed that any attempt was made to equalize the voting representation—an attempt which could not possibly succeed because of the nature of the plan.

Actually, the 13% deviation—described by the court as "minor" (Opinion, p. 5)—neither indicates nor reflects the potential for gross inequality of representation inherent in the scheme. Since the number of legislators

from any town is determined by dividing its population by that of the smallest town and rounding off the result to the nearest whole number, the size of the deviation will vary arbitrarily from year to year, according to the size of the fraction to be rounded.[2] For example, had the plan been in effect in 1950, the deviation would have been 26%: in 1957, 22%; in 1963, 27%; and in 1966, 26%. The potential for inequality inherent in the plan becomes even more apparent when one considers that an increase of only 3,000 in the population of Stony Point, assuming that the populations of the other towns remain constant, would change the deviation from the present 13% to more than 47%. In fact, it is theoretically possible for a plan such as the one before us to result in deviations approaching 100%.[3] And, since the plan rigidly fixes district lines—providing for no variation—there is no way to compensate for or minimize such extreme deviations.

This, though, does not mean that political subdivisions may not be taken into account when drawing legislative districts. I recognize, of course, that there may be historical and, perhaps, functional reasons for preserving

[2]In other words, if the population of each of the towns happens to approximate an integral multiple of that of Stony Point—as it does under the 1969 census—then, the deviation will be relatively small—for example, as in this case, 13%. More typically, however, the formula will require a rounding off of large fractions and will result, accordingly, in very much greater deviations.

[3]This may be seen from the following example: if the smallest town, town A, had a population of 10,000, town B had 14,999 and town C had 15,001, then, under the plan, town C would have two representatives and town B would only have one, even though their populations were almost identical. The deviation in such a case would be 99.96%.

the identity of the towns in a county legislative body—even though no such reasons have been shown in this case and even though the towns would remain independent, coordinate governments under any scheme. All that is required is that a plan be sufficiently flexible to give all the voters of the County an equal voice in its government. Population, as the *Reynolds* case indicates, need not be the only factor to be considered but it must be the *controlling* factor (377 U. S., at pp. 579-580):

> "[N]either history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes. Considerations of area alone provide an insufficient justification for deviations from the equal-population principle."

And, underscoring the same thought, the court went on to say (p. 581):

> "[I]f, even as a result of a clearly rational state policy of according some legislative representation to political subdivisions, population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all of the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired."

Here, quite obviously, population was "submerged as the controlling consideration" in fixing the boundaries of the legislative districts and, consequently, the right of the county's citizens "to cast an effective and adequately weighted vote [has been] unconstitutionally impaired."

That it is possible to reconcile the one man, one vote

principle with the desire to preserve town identity in the county legislature is demonstrated by a proposal prepared by the League of Women Voters and put forward by several of the plaintiffs. Under this plan, all but three of the 18 members of the legislature would still represent districts located wholly within town lines and, as so apportioned, the maximum population deviation would amount to only 4%. Indeed, the plan approved in *Town of Greenburgh v. Board of Supervisors* (56 Misc. 2d 152, affd. 25 N. Y. 2d 817)—upon which the court relies—illustrates an approach which could have been, but was not, followed here. Although it resulted in a deviation of 14%, slightly more than will result this year from the plan before us, the proposal in *Greenburgh* was held acceptable because town lines, while accorded weight, *were not treated as inviolate*. In sharp contrast to the present case, the traditional town boundaries were disregarded where necessary in order to accommodate the essential interest of equal representation.

In sum, then, in view of the fact that the legislative districts were drawn strictly in accordance with town lines *and without regard to population*, it is evident that there was no effort, good faith or otherwise, to achieve "as nearly as practicable" equality of voting power. Since under the plan the weight of a citizen's vote varies depending on the town in which he lives and this variance is likely to increase in future years, the plan deprives the voters of equal protection of the laws and may not be

constitutionally sustained.[4] However, in view of the imminence of the 1969 election and the fact that the plan achieves far greater equality than the existing board of supervisors form of county government, I would approve the plan as an interim measure and require the county legislature, to be elected next month, to formulate a further plan of apportionment consistent with constitutional standards. (See *Honig v. Board of Supervisors*, 24 N. Y. 2d 861, *supra*.)

The order appealed from should be modified to the extent of directing that a new apportionment plan be adopted by the county legislature chosen in the 1969 election and, as so modified, affirmed.

Order affirmed, without costs. Opinion by Burke, J. All concur except Fuld, Ch. J., who dissents in part and votes to modify in an opinion in which Jasen, J., concurs.

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[4]Having reached this conclusion, I find it unnecessary to treat the plaintiffs' further point that a multi-member districting scheme is unconstitutional on the ground that it "allocates greater voting power to voters in the most populous districts." (Banzhaf, Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle, 75 Yale L. J. 1309, 1337; see *Chavis v. Whitcomb*, —— F. Supp. ——, ——, 38 USLW 2104 [decided by U. S. Dist. Ct. So. Dist. Ind., July 28, 1969]; cf. *Iannucci v. Board of Supervisors*, 20 N. Y. 2d 244, 252, *supra*.) I merely note that, although the Supreme Court has, on several occasions, upheld the constitutionality of multi-member district plans, it has yet to pass upon the arguments raised in the present case. (See, e. g., *Burns v. Richardson*, 384 U. S. 73; *Fortson v. Dorsey*, 379 U. S. 473.)

Supreme Court of the United States

No. 1033 ----, October Term, 19 69

Samuel J. Abate, etc., et al.,

Petitioners,

v.

Paul F. Mundt, et al.

Order allowing certiorari. Filed February 20 ------, 19 70.

The petition herein for a writ of certiorari to the Supreme Court of the State of New York of Appeals is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
JAN 5 1970
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1969.

No. [redacted] 71

SAMUEL J. ABATE, as a Taxpayer of the County of Rockland, and as a Representative of Others Similarly Situated,

-and-

JUNE MOLOF, MINDY BAKER, GLORIA ENGLISH, JOYCE BRAZILLER, LINDA BERNS and JUDY BARTOSIK, as Individuals and as Representatives of Others Similarly Situated,

-and-

CORNELIUS T. O'SULLIVAN, ICHABOD F. SCOTT and MICHAEL J. CLARKE,

Petitioners,

-against-

PAUL F. MUNDT, PHILIP J. ROTELLA, JOHN B. LOVETT, JOHN F. MC ALEVEY, HAROLD K. GRUNE, constituting the Board of Supervisors of the County of Rockland, THE COUNTY OF ROCKLAND, and CHARLES FURST and MARION DORSEY, as Commissioners of the Board of Elections of the County of Rockland, and THE BOARD OF ELECTIONS OF ROCKLAND COUNTY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Court of Appeals of New York

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1969.

No. .....

SAMUEL J. ABATE, as a Taxpayer of the County of Rockland, and as a Representative of Others Similarly Situated,

-and-

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CORNELIUS T. O'SULLIVAN, ICHABOD F. SCOTT and MICHAEL J. CLARKE,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals of the State of New York

FRANK P. BARONE, on behalf of Petitioner Samuel Abate, DORIS FRIEDMAN ULMAN, on behalf of Petitioners June Molof et al. and PAUL H. RIVET, on behalf of Petitioners Cornelius T. O'Sullivan et al., joining together for the purposes of this Petition only, pray that a writ of certiorari issue to review the order of the Court of Appeals of the State of New York entered in the above case on November 12, 1969.

OPINIONS BELOW

The opinion of the Supreme Court of the State of New York at Special Term dated July 21, 1969 and modified on July 30, 1969 and not yet reported is set forth in the Appendix hereto, at pages 12 and 28.

The opinion and dissent of the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department dated August 26, 1969 and not yet reported is set forth in the Appendix hereto, at page 30.

The opinion and dissent of the Court of Appeals of the State of New York dated November 12, 1969 and not yet reported is set forth in the Appendix hereto, at page 40.

JURISDICTION

The order of the Court of Appeals of the State of New York was made and entered on November 12, 1969 and a copy thereof is appended to this peti- on October 8, 1969

tion in the Appendix at page 69. The jurisdiction of this Court is invoked under 28 USCA 1257 (3).

QUESTIONS PRESENTED

The Board of Supervisors of the County of Rockland was ordered to reapportion itself "with all deliberate speed" by an order of the Supreme Court of the State of New York at Special Term on June 2, 1969. On July 8, 1969, the Board of Supervisors submitted to Special Term for approval a reapportionment plan providing for multi-member districting. Rockland County is made up of five towns. There are no cities in Rockland County. The populations of the several towns vary enormously, as shown by the latest (1969) Federal census:

Stony Point	12,114
Haverstraw	23,676
Orangetown	52,080
Clarkstown	57,883
Ramapo	73,051
Total Population	218,804

The multi-member district plan submitted by the Board of Supervisors of Rockland County on July 8, 1969, provides that each town shall be a district. Using the smallest town, Stony Point, as a base, each town is allocated as many legislators as its population is a multiple of the Town of Stony Point. Thus, the Town of Stony Point is allocated one legislator; the Town of Haverstraw, two; the Town of Orangetown, four; the Town of

Clarkstown, five; the Town of Ramapo, six; making a total of eighteen county legislators. The number of legislators would be subject to change as the population of each town shifts or increases.

Unfortunately, the towns within Rockland County are not exact multiples of the Town of Stony Point, so that the residents of the various towns do not have equal representation on their county legislature. Using the 1969 Federal census figures set forth above and the mathematical formula of Kirkpatrick v. Preisler, 394 U.S. 535, 89 S.Ct. 1225 for determining the difference in population equality among the districts within the county, the Town of Orangetown is 7.1 per cent below the mathematical ideal, the Town of Clarkstown is 4.8 per cent above the mathematical ideal and the Town of Haverstraw is 2.5 per cent above the mathematical ideal.(See Appendix page 73) The other two towns have minimal deviations. Thus, there is an 11.9 per cent deviation between the highest and the lowest population per legislator.

The Rockland County Board of Supervisors has not made a good-faith effort to achieve precise mathematical equality. Instead of reapportioning the county legislature with a view towards equal representation for equal numbers of people, the Board first set up its districts as being coterminous with existing town boundaries and let the population deviations fall

where they may.

The questions presented are:

1. Is the multi-member district plan proposed by the Board of Supervisors of Rockland County constitutional?

2. Is the population deviation of 11.9 per cent between the highest and the lowest population per legislator consistent with the rulings of this Court in determining equal representation for equal numbers of people?

3. Has the Board of Supervisors of Rockland County made a good-faith effort to achieve precise mathematical equality as required by the rulings of this Court?

CONSTITUTIONAL PROVISION INVOLVED

The provision of the United States Constitution involved in the determination of this case is Amendment XIV, Section 1, which states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

The basic facts, which are not in dispute, are as follows. The legislative body of the County of Rockland has statutorily and traditionally been composed of five supervisors, being the duly elected supervisors of each of the five towns. The present action was instituted by Samuel Abate, one of the petitioners herein, in the Supreme Court of the State of New York, for the County of Rockland, by the service of a summons and complaint on September 30, 1968, for judgment directing the reapportionment of the Rockland County Board of Supervisors and directing the Board to place on the ballot for referendum a 17-member, single-member district plan. Defendants' answer was served on March 14, 1969. Petitioners June Molof et al. were granted leave to intervene as party-plaintiffs by the Supreme Court of the State of New York on April 14, 1969. Also on April 14, 1969 the defendant Board of Supervisors presented to said Court for approval an interim weighted voting plan of reapportionment. The Honorable Joseph F. Hawkins, Justice of the Supreme Court of the State of New York, pursuant to an order made on May 28, 1969 and entered in the Rockland County Clerk's office on June 2, 1969, held that the interim weighted voting plan was unconstitutional and directed the Board of Supervisors to present to the Court a proposed plan of reapportionment "with all deliberate speed." On July 8, 1969, a reapportionment plan providing for multi-

member districts was submitted to the Court. On July 9, 1969, Petitioners Cornelius T. O'Sullivan et al. were permitted to intervene as party-plaintiffs.

In a decision dated July 21, 1969 and modified July 30, 1969, set forth in the Appendix hereto at page 12, Justice Hawkins approved the multi-member district plan proposed by the Board of Supervisors. All plaintiffs to this action, who are now petitioners herein, objected to the plan as being unconstitutional, based upon the Fourteenth Amendment to the United States Constitution and the decisions of this Court.

All plaintiffs appealed this decision to the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department. In a decision dated August 26, 1969, the Appellate Division affirmed the Special Term Decision, the Honorable George J. Beldock, Presiding Justice of said Court, dissenting. The decision (no opinion) and dissent are set forth in the Appendix hereto at page 28. Basing his dissent on the two most recent United States Supreme Court decisions on reapportionment, Wells v. Rockefeller, 394 U.S. 542 and Kirkpatrick v. Preisler, 394 U.S. 526, Justice Beldock held that the 11.9 per cent variance between the highest and the lowest population per legislator in Rockland County did not satisfy the "one-man, one-vote" principle inasmuch as the Board of

Supervisors did not adequately justify the reasons for such variance. He therefore concluded that the plan was unconstitutional.

The decision of the Appellate Division was appealed by all the plaintiffs to the Court of Appeals of the State of New York, the highest Court in that State. The Court of Appeals affirmed the lower court's decision in an opinion dated November 12, 1969, the Honorable Stanley H. Fuld, Chief Judge of said Court and the Honorable Matthew J. Jasen, Associate Judge of said Court, dissenting. The opinion and dissent are set forth in the Appendix hereto at page 38 In his dissent, in which Judge Jasen concurred, the Chief Judge rejected the conclusions of the majority of the Court which held that although the permissible variation in population between congressional districts is "almost micrometric," the permissible deviations in the apportionment of state legislatures is broader and in the apportionment of local legislative bodies even broader than those of state legislatures. Judge Fuld stated, "the very same rationale which requires that all votes be accorded equal weight in elections to Congress and state legislatures demands rigorous adherence to the one man, one vote principle in a county-wide election of its legislative body. A resident and voter is undoubtedly concerned with the actions of his county or municipal legislature, as he is with those of Congress or the state legislature."

Judge Fuld observed that although the decisions of the United States Supreme Court recognize the need for innovation and flexibility in the organization of local governments, "there is nothing in those decisions which implies that, in drawing electoral districts for legislative office, it is permissible to accord the votes of citizens living in one area greater weight than is accorded the votes of citizens in another area." The dissent concluded that the 11.9 per cent variation in the Rockland County case was not de minimis and that the Board of Supervisors had not made a good-faith effort to achieve absolute equality, as mandated by this Court in Kirkpatrick v. Preisler, supra. Furthermore, Judge Fuld stated that there is, in the multi-member district plan, the potential for gross inequality far in excess of the 11.9 per cent deviation which currently exists. Alluding to a chart submitted by one of the appellants herein, the dissent noted that if the plan had "been in effect in 1950, the deviation would have been 26%; in 1957, 22%; in 1963, 27%; and in 1966, 26%" and that the potential for inequality inherent in the plan could be even greater.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it erroneously interprets the decisions of this Court in the area of reapportionment and, more specific-

ally, the two recent cases of this Court, Kirkpatrick v. Preisler and Wells v. Rockefeller, supra.

In Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, this Court held that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees to each voter an equal voice in his state government, thereby extending the principle of "one-man, one-vote" to state legislative bodies. In Avery v. Midland County, 390 U.S. 474, this Court stated that there is "little difference, in terms of the application of the Equal Protection Clause and the principles of Reynolds V. Sims, between the exercise of state power through (state) legislatures and its exercise by elected officials in the cities, towns, and counties."

In Kirkpatrick v. Preisler and Wells v. Rockefeller, supra, this Court elucidated on the principle that, as nearly as practicable, every man's vote is to be worth as much as another's, and rejected both reapportionment plans because the proponents of said plans had not made a good-faith effort to achieve precise mathematical equality and could not justify the population variances, even though those variances were comparatively small. Indeed, in the Kirkpatrick case, there was a variance of only 5.96 per cent between the highest and lowest population per legislator, as compared with the Rockland County variance of 11.9 per cent between the highest and lowest pop-

ulation per legislator.

In the Rockland County case, the Court of Appeals of the State of New York drew a distinction between permissible population variances on the Congressional level, the state level, and the local level. This is in direct conflict with the decisions of this Court stated heretofore guaranteeing to each voter, "as nearly as practicable", an equal voice in his Congressional, state and local legislative bodies.

There are hundreds of local legislative bodies in New York State alone which will be affected by the Court of Appeals decision in this case. Indeed, millions of residents may lose their right to equal representation in their local legislative bodies, if the basic principle of "one-man, one-vote" is to be applied differently to Congressional, state and local governments.

CONCLUSION

For thereasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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DORIS FRIEDMAN ULMAN
Counsel for Petitioners
June Molof et al.

PAUL H. RIVET
Counsel for Petitioners
Cornelius T. O'Sullivan
et al.

APPENDIX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

SAMUEL J. ABATE, as a Taxpayer of the County of Rockland and as a Representative of Others Similarly Situated,

Plaintiff,

-and-

JUNE MOLOF, MINDY BAKER, GLORIA ENGLISH, JOYCE BRAZILLER, LINDA BERNS and JUDY BARTOSIK, as Individuals and as Representatives of Others Similarly Situated,

Plaintiffs-Intervenors,

-against-

PAUL F. MUNDT, PHILIP J. ROTELLA, JOHN B. LOVETT, JOHN F. MC ALEVEY, HAROLD K. GRUNE, constituting the Board of Supervisors of the County of Rockland, THE COUNTY OF ROCKLAND, and CHARLES FURST and MARION DORSEY, as Commissioners of the Board of Elections of the County of Rockland and THE BOARD OF ELECTIONS OF ROCKLAND COUNTY,

Defendants.

HAWKINS, J.

The County of Rockland brings the instant application seeking judicial approval of its proposed plan for the reapportionment or restructuring of the

County's legislative branch of government. The proposal is a consequence of this Court's prior ruling on May 12, 1969, disapproving the defendants' previous proposal for an interim plan based upon a "weighted voting" arrangement.

It appears that on that occasion we were unduly sanguine when in demurring from imposing an alternative plan, we noted that judicial intervention is "***appropriate only when a legislative body fails to reapportion according to constitutional requisites in a timely fashion after having had an adequate opportunity to do so (cf Reynolds v. Sims, 377 U.S. 533, 586)" and that "***events may make it necessary-despite our hopes to the contrary-for the court to impose a plan, as in Town of Greenburgh, supra, if the defendants fail to do so.

Alluding to our prior determination, we there concluded by directing the Board of Supervisors to "***present to the court 'with all deliberate speed,' a proposed plan for redistricting and/or reapportionment."

In conformity therewith, a plan has been submitted to which objections are interposed by plaintiff and two inter-

venors, the League of Women Voters and Cornelius T. O'Sullivan, et al. The latter were granted leave to intervene on the morning of the adjourned argument held in connection with the pending motion, but were limited to presenting oral argument and submitting a brief.

There are essentially three decisions which are basic to any court endeavoring to square the circle or seeking an exit from the labyrinth of Rockland County's reapportionment dilemma. Kirkpatrick v. Preisler, -U.S.-, 89 S. Ct. 1225, and Wells v. Rockefeller, -U.S.-, 89 S.Ct. 1234, respectively, enjoin legislative bodies to make "good-faith effort to achieve precise mathematical equality. See Reynolds v. Sims, 377 U.S. 533, 577 (1964)" and that there be "***equal representation for equal numbers of people" as nearly as is practicable.

It is well to note at this juncture that in the period intervening since our last opinion, the Legislature of the State of New York, by Chapter 834 of the Laws of 1969, enacted the so-called "two hats" bill permitting the same person to occupy two elected offices, that of Supervisor and County

Legislator. The said statute also gives legislative sanction for re-apportioning via a multiple-member district plan for electing County Legislators.

Upon the Governor's approving the bill, unfortunately, there was neither message nor memorandum. However, the statute contains a rather complete statement of intent; and upon the Court's initiative, there was made available a "memorandum in support" of the bill prepared by its sponsor, Hon. Edward F. Crawford, Chairman of the Judiciary Committee of the Assembly. In essence, the bill's intent is to give legislative sanction to a variety of re-apportionment plans - some previously held invalid by the courts - and to accord greater flexibility to counties which have to re-apportion. We shall, subsequently, comment further on the statute.

The proponents' plan, we are assured, is the very same plan previously proposed in 1966. Its conceit is to continue and to perpetuate the existing political identities of the five towns which presently constitute the County's body corporate, with each of said towns to elect a varying number of County Legislators

dependent upon their respective populations. The minimum or base population figure for each such representative is derived from the census for the least populous town, to wit, the Town of Stony Point whose population as most recently extrapolated is 11,704. There would thus be allotted one (1)) County Legislator to Stony Point, and the Town of Ramapo - the most populous, with some 73,051 persons - allocated six (6) representatives, resulting in a total of eighteen (18) to be elected.

The proposal continues the office of Town Supervisor, providing for each town to have a Supervisor. The basis for the changes in said latter office derives from the recent statute previously referred to (Chapter 834, L.1969), whereby the same individual may be "elected" to two offices, i.e., County Legislator and Town Supervisor. The County Legislature is to be composed of the Legislators of each Town-District, including the Town Supervisor; but **** one of such legislators so allocated to each district shall be the duly elected supervisor of the town contained within such district and shall hold office as a County legislator by virtue of such election to the office of supervisor of the town" (§5)

Thus, one successful candidate in each of the said five towns who elected Supervisor would automatically be elected a County Legislator. The terms of said offices, however, are not concurrent for the Supervisors would serve for only a two-year term whereas the County Legislators would hold office for four years. Further, a vacancy in the office of a non-Supervisor County Legislator would be "filled by a majority vote of the members of the Town Board of the town contained within the district from which such Legislator was elected." (§6)

Again we note the caveat of the late Mr. Justice Felix Frankfurter that the Supreme Court, in Baker v. Carr, 369 U.S. 186, 268, was creating "a mathematical quagmire" without providing the corollary "legal calculus."

As for the matter at bar, we believe - as shall be more fully

explained hereinafter - that the precise percentage variations in either a multi-member as against a single-member plan are of minimal importance for the initial root problem which has to be resolved is whether there is an insuperable constitutional barrier- temporary or permanent- to the multiple-member district technique of electing local legislators.

Further confronting this court is the rather inexorable political time-table. Assuming, but without so deciding, that there is greater legal merit to the intervenors' proposals for single-member districts, there are the myriad and complex problems involved should the court attempt plastic surgery by severing Rockland County into some eighteen separate, equal and complete districts. Despite the parties and the intervenors having had several years within which to prepare a map keyed to a single-member district plan, none has been presented which

the court could employ, if so minded, to delineate the requisite individual districts if, indeed, the single-member district plan is the only viable constitutional recourse.

Respecting the constitutionality of the "two hats" statute, we find no need to rule thereon since in determining the within section, we can rely on the presumption of constitutionality - however elastic. Its intent and purpose are quite clear - and we are not without judicial conversance in this area since the statute obviously was intended, in part, to overcome our holding in Matter of Brayman v. Stevens, 54 Misc. 2d 974, aff'd 28 A.D. 2d 1095, and by the Court of Appeals in 20 N.Y. 2d 868, which barred a candidate from simultaneously running for both offices of Supervisor and County Representative. It may well be that the legislation validly achieves such purpose of permitting the same person to run for the two offices at the same election; but it neither provides nor sanctions the proposal at bar

whereby a candidate by winning one office is automatically or, at it were, by operation of law, thereby elected to yet another office. The statute, as we construe it, is permissive, i.e., "a plan of apportionment *** may provide *** that supervisors of towns *** shall be eligible to be elected as members of the county legislative body." (§2 (b)) but "election" means garnering the most votes for a particular office. It, therefore, follows that a Town Supervisor may be elected to both said offices at the same election; but he will have to run separately for each office.

It is quite conceivable - and assuredly the electors should be given such electoral option - to reject a candidate as a Supervisor but, nevertheless, to elect him to the office of County Legislator. To do otherwise is to change the statute's sobriquet from the "two hats" bill to "Hobson's Choice", particularly where a district is

entitled to only one County Legislator. The statute's language- "eligible for election"- imports running for each particular office. The fortunate candidate so elected may, indeed, wear two hats, a la Pooh-Bah; but he will have to acquire them by contest, not by grace.

We note that the County places great reliance upon Mr. Justice Dillon's opinion in Town of Greenburgh, et al. v. Board of Supervisors of Westchester County, 298 N.Y.S.2d 615, which was most recently affirmed by the Court of Appeals, -N.Y.2d-, (6/16/69), wherein he selected from three proposals a single-member district plan with modifications he engrafted. The language seized upon by the County respecting the validity of a multiple-member district plan (Greenburgh plan) constitutes dicta since, although observing that it had "good features", it was not approved by that court.

It ineluctably follows from the foregoing that the proposed plan for reapportioning Rockland County cannot be approved in toto; but it is equally inescapable that the reapportionment of Rockland County has been too long delayed. Courts have approved less than ideally acceptable plans, as in Town of Greenburgh, supra, despite reservations or qualms. (See, also, Duquette v. Board of Supervisors of the County of Franklin, 32 A.D.2d 706 (1)).

It is the court's holding that the defendants' proposed plan for reapportionment is approved, but with the following modifications and limitations:

(1) The County Legislature is to be comprised of nineteen (19) County Legislators who shall be elected at the coming general election to be held on the 4th day of November, 1969.

(2) The existing five (5) towns of Rockland County are denominated and declared to be "County Legislative Districts", and each shall elect to the County Legislators, respectively:

District No. 1, Stony Point - one (1) County Legislator

District No. 2, Haverstraw - two (2) County Legislators

District No. 3, Ramapo - seven (7) County Legislators

District No. 4, Clarkstown - five (5) County Legislators

District No. 5, Orangetown - four (4) County Legislators

thereby constituting a total legislative body of nineteen (19) members.

The within modification of adding one additional County

Legislator to the representation from the Town of Ramapo (District No. 3) is prompted by several considerations. A legislative body containing an even number of members which has no provision for a presiding officer casting a vote so as to break a tie vote invites a legislative impasse; that not too improbable eventuality is thereby eliminated.

There is a further and perhaps greater stimulus for so doing. We decline to participate in what may be characterized as a "numbers game", i.e., what are the precise permissible percentile variations in population per Legislator, or what is an acceptable arithmetical differential between the "largest to smallest population per Legislator?" Is it, as contended by the proponents, in the ratio of "1.13 to 1", or rather, twelve (12%) per cent as urged by the objector? (The latter, incidentally, is more nearly correct, for if one district

is "7.1% under represented" and another is "2.5% over represented," this makes for a total differential of 9.6%.)

The solution seems simple; by adding one Legislator to the most grievously under-represented district, we thereby diminish the inequality; and, we also provide the tie-breaking vote. Employing the County's figures of a total County population of 218,804, and dividing by 19, in lieu of the proposed 18, yields, by sheer serendipity, an exact quotient of 11,516 souls per Legislator, per district--and the smallest Town's population, that of Stony Point, is 12, 114. It is true that Ramapo thereby acquires an additional Legislator on a 10,426 per persons basis; but no fairer arithmetical recourse is available unless the number of Legislators is doubled or trebled.

(3) A candidate for both offices of Supervisor and County

Legislator will have to stand separately for election to each said office; and if elected to both, he shall be seated in the County Legislature solely by virtue of his election to that body. The instant conversion of each Supervisor into a County Legislator, but with a different term of office, paraphrasing George Orwell's oft-quoted amphorism, in "Animal Farm", is to declare that "all County Legislators are equal; only some are more equal than others."

(4) Vacancies, if any, in the office of County Legislator, as in Town of Greenburgh, supra, shall be filled by "appointment" by the County Legislature and not by the particular Town Board of the Town which elected the Legislator to be replaced.

We wish to note and to commend the County Attorney and counsel for the League of Women Voters for their excellent comprehensive briefs and oral argument.

The defendants' application is granted to the extent hereinbefore noted. No costs.

Submit judgment on notice.

JOSEPH F. HAWKINS

J.S.C.

Dated: July 21, 1969

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

----------x

SAMUEL J. ABATE, etc.,

Plaintiff,

-and-

JUNE MOLOF, et al.,

Plaintiffs-Intervenors,

-against-

PAUL F. MUNDT, et al.,

Defendants.

----------x

HAWKINS, J.

Subsequent to the decision herein, dated July 21, 1969, the court's attention has been directed to the effect of adding one additional County Legislator to the representation from the Town of Ramapo. The court has erred in its mathematics and, upon reconsideration, finds this modification creates a thirteen (13%) per cent differential favoring the Town of Orangetown. Comparing the Towns of Ramapo and Orangetown, without giving due consideration to the effects upon the population averages and the resulting variations of percentages in all districts, leads to an undesired result. If it is sought to implement the original intent, a greater number of legislators

would have to be authorized, and this should not be imposed at this time. While the considerations set forth on behalf of the modification remain valid, the untoward mathematical conclusion requires the court to withdraw its statement that "the solution seems simple."

Additionally, it appears that the court was unduly solocitous that a possible legislative stalemate could result from an even numbered total membership in the County Legislature. Thus, there is added cause for keeping the representation for Ramapo to a total of six (6) County Legislators as originally proposed by the County of Rockland.

Accordingly, the court on its own motion, modifies its opinion of July 21, 1969, so that item (1), on pg. 6, shall provide that the County Legislature be comprised of eighteen (18) County Legislators in lieu of "nineteen (19) County Legislators"; and item (2), first paragraph on pg. 7, shall read: "District No. 3, Ramapo" - six (6) County Legislators in lieu of seven (7) County Legislators." Except as hereinabove amended, the opinion of July 21, 1969, stands.

So ordered.

JOSEPH F. HAWKINS
J. S. C.

Dated: July 30, 1969

SUPREME COURT, APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT.

BELDOCK, P.J., BRENNAN, RABIN, MUNDER and KLEINFELD, JJ.

SAMUEL J. ABATE, etc.,

Plaintiff-Appellant-Respondent,

- and -

JUNE MOLOF, et al.,

Plaintiff-Intervenor-Appellant-Respondents,

- against -

PAUL F. MUNDT, et al.,

Defendants-Respondents-Appellants.

BELDOCK, P.J. (dissenting): On this appeal, we have been called upon to determine the validity of the multi-member district reapportionment plan for the new County Legislature proposed by the Board of Supervisors of the County of Rockland. A subsidiary question is whether an individual elected as a town supervisor may automatically serve as a county legislator without standing separately for election to the legislative post. Special Term and a majority of this Court has approved the reapportionment plan but has held that a candidate for the offices of both supervisor and county legislator must seek election to each post separately. I agree with this determination in part only. In my opinion, the reapportionment plan is unconstitutional.

The proposed reapportionment plan seeks to implement the "one man, one vote" principle by dividing the County into five election districts, the boundaries of which are coterminous with the boundaries of the five towns in Rockland County, and by apportioning

a varying number of elective positions to each district, depending upon its population. The following chart adequately displays the mathematics of the plan:

District	Legislators	Population	Population per Legislator
No.1,Stony Point	1	12,114	12,114
No.2,Haverstraw	2	23,676	11,838
No.3,Ramapo	6	73,051	12,175
No.4,Clarkstown	5	57,883	11,577
No.5,Orangetown	4	52,080	13,020
	18	218,804	

The result of this allotment is that Orangetown is under-represented by 7.1% and that Clarkstown is over-represented by 4.8%.* This yields a maximum variance of 11.9%.

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*The average population per legislator is 12,156. Thus, Stony Point is over represented by 0.3%; Haverstraw is over-represented by 2.5%; and Ramapo is under-represented by 0.2%.

Two recent United States Supreme Court decisions (Kirkpatrick v. Preisler, 394 U.S. 526 and Wells v. Rockefeller, 394 U.S. 542) have cast considerable doubt upon the heretofore-assumed validity of reapportionment plans which managed to achieve de minimis variations but which fell short of exact mathematical equality. In the Kirkpatrick and Wells cases, the court struck down single-member Congressional reapportionment plans with variances of 5.97% and 13.1% respectively. At bar, we are faced with a variance of 11.9% in a multi-member scheme involving a county legislature. In Town of Greenburgh v. Board of Supervisors, 32 A.D. 2d 892, affd 25 NY 2d _____ (decided June 16, 1969), the Court of Appeals concurred in our approval of Westchester's single-member district plan with a maximum variance of 12.8%. I reject, however, the suggestion that, because the variance is 11.9%, the approval of Westchester's reapportionment plan in the Town of Greenburgh case automatically brings the plan at bar within the

ambit of constitutional standards. In my opinion, the reasoning of the Kirkpatrick and Wells cases is decisive of this appeal and we cannot justify an affirmance here solely upon the mathematics of Town of Greenburgh. In Kirkpatrick, supra, the court stated:

"We reject Missouri's argument that there is a fixed numerical or percentage population variance small enough to be considered de minimis and to satisfy without question the 'as nearly as practicable' standard. The whole thrust of the 'as nearly as practicable' approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case. The extent to which equality may practicably be achieved may differ from State to State and from district to district. Since 'equal representation for equal numbers of people (is) the fundamental goal for the House of Representatives,' Wesberry v. Sanders, supra, at 18, the 'as nearly as practicable'

standard requires that the State make a good-faith effort to achieve precise mathematical equality. See Reynolds v. Sims, 377 U.S. 533,577 (1964). Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small."
(Kirkpatrick v. Preisler, supra, at 530-531) (emphasis supplied)

The force of this statement is not diminished because of the circumstances that the court in Kirkpatrick was dealing with Congressional as opposed to inter-state reapportionment (See Reynolds v. Sims, 377 U.S. 533; Wells v. Rockefeller, supra, at 554 (White, J. dissenting)), nor that it was concerned with a single member as opposed to a multi-member district plan (See Burns v. Richardson, 384 U.S. 73; Swann v. Adams, 385 U.S. 440; Kilgarlin v. Hill, 386 U.S. 120). In the light of the Kirkpatrick and Wells cases, these distinctions are essentially

meaningless in the context of the one man, one vote principle; particularly so where, as here, we are dealing with a unicameral legislature.

This appeal, therefore, must be dealt with in terms of the justification offered for the variance. We should not content ourselves with the happenstance that the variance in this case is less than in some other case. Notwithstanding the long history of Rockland County's attempts to reapportion, and the particular problems that the county faces, I believe that the variance has not been adequately justified. Indeed, defendants' argument on appeal makes little attempt at justification. The thrust of defendants' position on appeal (aside from arguing the abstract acceptability of a multi-member districting plan) is that the variance is de minimis. This argument is predicated on language in the Reynolds and Swann cases to the effect that de minimis variances will be accepted provided that a rational state policy underlies the

basis for the variances. It seems to me, though, that the Wells and Kirkpatrick cases provide the guidelines for determining rationality. In justification of the variance, the defendants lay stress on the plan's use of existing town lines. This reasoning, however, was rejected by the court in Wells v. Rockefeller, supra, where New York sought to justify variances by pointing to the maintenance of county lines. The court stated:

> "*** New York tries to justify its scheme of constructing equal districts only within each of seven sub-states as a means to keep regions with distinct interests intact. But we made clear in Kirkpatrick that 'to accept population variances, large or small, in order to create districts with specific interest orientations is antithetical to the basic premise of the constitutional command to provide equal

representation for equal numbers of people.'" (Wells v. Rockefeller, supra, at 546)

Defendants' counter-argument that the use of town lines is an obstacle to gerrymandering was met by the court in Kirkpatrick:

"The State's interest in constructing congressional districts in this manner, it is suggested, is to minimize the opportunities for partisan gerrymandering. But an argument that deviations from equality are justified in order to inhibit legislators from engaging in partisan gerrymandering is no more than a variant of the argument, already rejected, that considerations of practical politics can justify population disparities." (Kirkpatrick v. Preisler, supra, at 534) (footnote omitted)

In sum, it seems clear that no attempt has been made to achieve a mathematical balance within the standards set forth by the Supreme Court. The plan at bar merely seeks to achieve the best apportionment against the preconceived notion that

the towns must stay intact - a notion which has been rejected by the Supreme Court in its latest pronouncements.

Though I believe that the within plan is unconstitutional, I would not recommend that it be disapproved. Because the last day for filing nominating certifications is imminent (September 5th), I feel that our unreserved disapproval, for obvious reasons, would be ill-advised (See Kilgarlin v. Hill, 386 U.S. 120,121; Martin v. Bush, 376 U.S. 222,223). Accordingly, I would modify the judgment only to the extent of directing that a new reapportionment plan be submitted after the election of November 4th.

August 26, 1969

Judgment of the Supreme Court, Rockland County, entered July 31, 1969, affirmed, without costs, insofar as appealed from.

BRENNAN, RABIN, MUNDER and KLEINFELD, JJ., concur.

BELDOCK, P.J. dissents in separate opinion and votes to modify the judgment in accordance therewith.

STATE OF NEW YORK
COURT OF APPEALS

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2. No. 428 69

Samuel J. Abate,
Plaintiff-Appellant-Respondent,

-and-

June Molof & ors., & c.,
Plaintiffs-Intervenors-Appellants-
Respondents,

-and-

Cornelius T. O'Sullivan, & ors.,
Plaintiffs-Intervenors-Appellants-
Respondents,

-vs.-

Paul F. Mundt, & ors., & c.,
Defendants-Respondents-Appellants.

OPINION

Unrevised and
Uncorrected.
Not for
Publication.

BURKE, J.:

Rockland County is presently governed by a Board of Supervisors, consisting of the Supervisors of each of the County's five constituent towns. In early 1966, a federal district court, upon its finding that the Board was malapportioned, ordered that a plan be devised which would satisfy the requirements of the Equal Protection Clause and that such plan be submitted to the voters of the County for their approval. (Lodico v. Board of Supervisors, 256 F. Supp. 442) Pursuant to that order, three plans were devised and submitted to the voters but were rejected at the polls.

In September, 1968, the present action was brought to compel the Board to reapportion in accordance with constitutional requirements. In response, the Board submitted a weighted voting scheme as an interim measure but, upon the plaintiffs' motion, that plan was rejected at

Special Term. The Board then devised and submitted the plan approved in the courts below, which is the subject of the present appeal.

The plan as adopted provides for a County legislature composed, on the basis of the population of the County as of 1969, of eighteen members chosen from five districts which correspond to the County's five constituent towns. Each district is assigned its legislators according to the district's population in relation to the population of the smallest district. The smallest district, Stony Point, has a population of 12,114 and is assigned one representative in the County legislature. The number of representatives to be assigned to each of the other districts is determined by dividing the population of each by the population of the base district, Stony Point, the number of representatives being the whole number resulting from that computation, plus any major fraction. The result in tabular form is as follows:

District	Population	No. of Representatives
Stony Point	12,114	1
Haverstraw	23,676	2
Orangetown	52,080	4
Clarkstown	57,883	5
Ramapo	73,051	6

Each representative is to be elected at large within the district so that each district other than Stony Point will be a multi-member district. Since the population of none of the other districts is an exact multiple of the population of Stony Point, there is some variation among districts in terms of the population per legislator, with the result that Stony Point is 0.3% "over-represented," Haverstraw is 2.5% "over-represented", Orangetown is 7.1% "under-represented," Clarkstown is 4.8% "over-represented," and Ramapo is 0.2% "under-represented." The plaintiffs attack the plan both on the ground that the Board has made

no attempt at achieving equality of representation in terms of population and on the ground that the utilization of multi-member districts is inherently defective. In addition, the plaintiffs attacked the so-called "two hats" provision of the plan under which each Town Supervisor, by virtue of his election to that office, would also automatically become a member of the County legislature.

Special Term approved the apportionment plan but modified the "two hats" provision so as to require that Town Supervisors, if they wish to hold seats in the County legislature, must stand separately for election to that office. The Appellate Division, Second Department affirmed that determination without opinion, with one justice dissenting on the ground that the plan merely sought to achieve the best apportionment possible in terms of the maintenance of existing town lines. We, in turn, affirm the order of the Appellate Division.

I

It is, of course, true that the "one man - one vote" principle enunciated in Reynolds v. Sims (377 U.S. 533) is applicable to local legislative bodies as well as to state legislatures (Avery v. Midland County, 390 U.S. 474,481). Under the principles set forth for the purpose of determining whether a particular plan of apportionment meets the requirements of the Equal Protection Clause, the question is whether the plan before us adequately apportions representatives on a population basis. However, the issue is not to be resolved merely in terms of a sterile mathematical exercise:

> "(T)he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts*** as nearly of equal population as is practicable. We realize that it is a practical

impossibility to arrange legislative districts so that each has an identical number of residents, or citizens or voters. Mathematical exactness or precision is hardly a workable constitutional requirement." (Reynolds v. Sims, supra at 577 (emphasis added)

Thus, the mere fact that there is a variation of 13% in the number of people per legislator under the present plan is not of itself sufficient to render the plan constitutionally defective (Roman v. Sincock, 377 U.S. 695, 711; Kirkpatrick v. Preisler, 394 U.S. 526, 530; Town of Greenburgh v. Board of Supervisors, 25 NY 2d 818). We must, therefore, in light of the particular circumstances of this case, determine whether the County has made a good faith effort to achieve equality of representation and whether there is sufficient justification for any variance from absolute equality. On this point,

it should be recognized that the "one-man, one-vote" cases have involved at least three levels, there are quite properly taken into account and weighed in the balance difference considerations both as to the permissible variations from strict equality and as to the justification for variations from such strict equality. The United States Supreme Court decisions indicate that, in regard to apportionment of congressional districts, the permissible variation from strict equality is indeed almost micrometric and the justification required for such deviation is correspondingly stringent (See Wesberry v. Sanders, 376 U.S. 1; Kirkpatrick v. Preisler, 394 U.S. 526; Wells v. Rockefeller, 394 U.S. 542). Decisions dealing with apportionment of state legislatures tend to reflect a broader scope for permissible deviations and a more tolerant attitude toward the practical justification for deviations (See Fortson v. Dorsey, 379 U.S. 433,437; Burns v. Richardson, 384 U.S. 73;

Swann v. Adams, 385 U.S. 440). Similarly, and of particular relevance on this appeal, the Court has indicated a willingness to allow a still broader scope for permissible deviations from strict population equality and the justification for such deviations when dealing with local, intra-state legislative bodies (See Sailors v. Board of Educ., 387 U.S. 105; Dusch v. Davis, 387 U.S. 112; Blaikie v. Wagner, 285 F. Supp. 364).

In light of this apparent difference in treatment, it seems clear that we may find the population variance here to be within permissible limits (See Town of Greenburgh v. Board of Supervisors, 25 NY 2d 817) and the practical and historical justification for the variance to be sufficient. What the plan does is not to ignore population equality, but rather to achieve substantial equality within the context of a long-established town government

framework, thus accommodating both constitutional and practical considerations (See Jackman v. Bodine, 53 N.J. 585, 252 A. 2d 209, cert. den. 38 U.S. L.W. 3120 (10/14/69)) It represents a balanced, bona fide application of the "one-man, one vote" principle to the needs and circumstances of local government. As such, it comes within the ambit of the Supreme Court's declaration "that variations from a pure population standard might be justified by such state policy considerations as the integrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts or the recognition of natural or historical boundary lines" (Swann v. Adams, 385 U.S. 440, 444 (emphasis added)) and the declaration that the recognition of such factors in devising an apportionment scheme is permissible so long as they "are free of any taint of arbitrariness or discrimination." (Roman v. Sincock, 377 U.S. 695, 710) We therefore reject the

contention that the plan before us is constitutionally defective because of the minor population variance involved.

It is also contended that the plan's incorporation of multi-member districts necessarily indicates a constitutional defect. However, the contention flies in the face of the decision in Fortson v. Dorsey (379 U.S. 433) in which the Court held that multi-member districts, drawn substantially along existing county lines, are constitutionally permissible so long as the vote of each voter is "approximately equal in weight to the vote of any other citizen in the State." (379 U.S. at 438) As with Fulton County, Georgia, in Fortson, the population of the Ramapo district in this case is approximately six times larger than that of Stony Point, a single-member constituency, and for that reason Ramapo elects six representatives. According to the reasoning of that opinion, such a multi-member district device is permissible since each voter in Ramapo votes for six

representatives to represent his interests in the County legislature and, if the weight of the vote of any voter in Ramapo, when he votes for six representatives, is not the exact equivalent of that of a resident of a single-member district, we cannot say that his vote is not approximately equal in weight to that of any other citizen in the County (379 U.S. at 437-438). That conclusion also adequately disposes of any claimed deficiency in such a plan based upon speculative mathematical analysis of such things as the "effectiveness" of actual representation. Indeed, as long as the basic population requirements of Reynolds v. Sims are met, and we hold that the Rockland County plan does meet those fundamental requirements, the use of multi-member districts "will constitute an invidious discrimination only if it can be shown that 'designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the

voting strength of a racial or political element of the voting population.'" (Burns v. Richardson, 384 U.S. 73, 88). No such showing has been made as to the plan under attack in this case. We therefore hold that the Rockland County Apportionment plan is constitutional.

II

The plan as adopted also contained a so-called "two hats" provision by which the person elected to the office of Town Supervisor of each of the five towns would automatically be entitled to a seat in the county legislature. Special Term modified this provision of the plan so as to require that, if a Town Supervisor also wished to hold a seat as a County legislator, he must be elected separately to the latter position. We affirm that determination. Town Supervisors are eligible to sit as members of County legislatures by virtue of the recently amended Section 10 of the Municipal Home Rule Law (L. 1969, ch. 834) which provides, in pertinent part, that "a plan of apportionment adopted by a county *** may provide *** supervisors of towns *** shall

be eligible to be elected as members of the county legislative body." (Emphasis added) The use of the term "elected" must be taken as indicating an intention on the part of the legislature that a town supervisor could serve as a county legislator only if he prevailed in an election for the office of county legislator. Although it is true that we held in Matter of Brayman v. Stevens (20 NY 2d 969) that Section 411 of the County Law prohibited a county officer from serving as a town supervisor, that decision antedated the enactment of Section 10(13) (b) of the Municipal Home Rule Law with which it is obviously inconsistent. Under familiar principles of statutory construction, the conflict between these provisions must be resolved by holding that the latter section impliedly repealed the former insofar as they are inconsistent, with the result that the latter is controlling. Special Term therefore properly determined that the plan should be modified to the extent indicated above.

Accordingly, the order of the Appellate Division, Second Department should be affirmed.

COURT OF APPEALS

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SAMUEL J. ABATE, as a Taxpayer, etc.,
Plaintiff-Appellant,

-and-

JUNE MOLOF, et al.,
Plaintiffs-Intervenors-Appellants,

-against-

PAUL F. MUNDT, et al., constituting
the Board of Supervisors,
Defendants-Respondents-Appellants.

- -x

FULD, CH. J. (dissenting in part):

I agree that the Municipal Home Rule Law (§10 (13) (b)) permits a town supervisor to serve on the county legislature and requires that he stand

separately for election to that body. I cannot, however, subscribe to the court's decision that the reapportionment plan adopted by the board in this case satisfies the demands of the Equal Protection Clause. In my view, the apportionment standards which apply to the states also apply to municipalities - e.g., counties, cities and towns - which exercise general governmental functions.

As the court's opinion indicates, Rockland County's proposal provides that each of its five towns shall constitute a legislative district. Using the smallest town, Stony Point, as a base, it accords each of the other four towns additional seats in the county legislature in an amount determined by dividing their populations by that of Stony Point and rounding off the result to the nearest whole number. Following this year's election under the plan, Orangetown's legislators will represent 13% more people than those from Clarkstown, even though each would be accorded the same vote in the county legislature.

There is no doubt that, in passing on a plan of apportionment, we are governed by the "one man, one vote" principle laid down in Reynolds v. Sims (377 U.S. 533) and in the cases which followed it. The majority asserts, however, that the structures of that principle vary and are to be applied differently depending on the "level of legislative apportionment" involved (Opinion, p.3). More specifically, it is stated that, although the permissible variation in population between congressional districts is "almost micrometric," there is a somewhat "broader scope for permissible deviations" in the apportionment of state legislatures and a "still broader scope" where the plan involves "local, intra-state legislative bodies" (Opinion, p.4).

Significantly, though, the opinion furnishes not a single reason which would justify such a differentiation, and I suggest that there is no basis either in logic or precedent for the distinction

sought to be drawn. On the contrary, the very same rationale which requires that all votes be accorded equal weight in elections to Congress and state legislatures demands rigorous adherence to the one man, one vote principle in a county-wide election of its legislative body. A resident and voter is undoubtedly concerned with the actions of his county or municipal legislature, as he is with those of Congress or the state legislature. There is no reason in either case why a citizen's voting power - his ability to influence the outcome of the election - should depend upon the district in which he happens to live. There is, as the Supreme Court observed in Avery v. Midland County (390 U.S. 474, 481), "little difference, in terms of the application of the Equal Protection Clause and the principles of Reynolds v. Sims, between the exercise of state power through (state) legislatures and its exercise by elected officials in the cities, towns, and counties." Indeed, in Seaman v. Fedourich (16 N Y 2d 94) and in Iannucci v.

Board of Supervisors (20 NY 2d 244) - both of which antedated the Supreme Court's decision in the Avery case - our court expressly held that the Reynolds principle applies to "elective legislative bodies exercising general governmental powers at the municipal level" (16 N Y 2d, at p.101; 20 N Y 2d, at p.249) and rejected proposals for legislative apportionment on the county and municipal levels which failed to accord equality of representation. (See, also, Honig v. Board of Supervisors, 24 N Y 2d 861).

In support of its conclusion that a lower standard of equality applied to elections of representatives to local legislative bodies, the court relies on two Supreme Court decisions - Sailors v. Board of Education (387 U.S. 105) and Dusch v. Davis (387 U.S. 112) - in which plans for the structuring of local governments were upheld. These cases are, however, totally inapposite. Sailors v. Board of Education, for instance, involved a scheme for the

appointment of nonlegislative officials and was not at all concerned with legislative apportionment; and, in the Dusch case, all of the legislators were to be elected at large and districts (or, more precisely, boroughs) were to be used "'merely as a basis of residence for candidates, not for voting or representation'" (387 U.S., at p. 116).[1]

These cases do, it is true, recognize the need for innovation and flexibility in the organization of local governments but there is nothing in the decisions which implies that, in drawing electoral districts for

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1. Indeed, the court pointed out that, "If a borough's resident on the counsel represented in fact only the borough, residence being only a front, different conclusions might follow" (387 U.S., at p. 116).

legislative office, it is permissible to accord the votes of citizens living in one area greater weight than is accorded the votes of citizens in another area. "Diluting the weight of votes because of place of residence," the Supreme Court noted in Reynolds (377 U.S. 533, 566, supra), impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discrimination based upon factors such as race (case cited) or economic status (case cited)."

In considering the plan before us, I find it difficult, if not impossible, to accept the majority's characterization of the 13% deviation infecting the proposed plan as a "minor population variance" (Opinion, p.5). I recognize, of course, that mathematical exactness or precision is not always possible and that the test to be applied in determining the validity of a plan is not solely the size of the percentage deviation. Nevertheless, an attempt must be made to keep that deviation to a minimum. As I read the relevant

cases, the significant and operative consideration is whether the plan under review reflects such an effort to achieve, "as nearly *** as is practicable," equality of representation. (Reynolds v. Sims, 377 U.S. 533, 577, supra; see Kirkpatrick v. Preisler, 394 U.S. 526, 531.) As the court declared in the Kirkpatrick case, legislative districts must be drawn to allow "only limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which a justification is shown."

It is the court's position that, despite the deviation population which the plan creates, factors other than population are equally significant and that the proposal represents a "bona fide application of the 'one man, one vote' principle to the needs and circumstances of local governments" which satisfies constitutional requirements (Opinion, p.4). This, it seems to me, misconceives the meaning of the phrase, "good-faith effort," found

in the cases. Even if one were to accept the majority's premise that the demands of the Equal Protection Clause may be relaxed in dealing with a county apportionment plan, nevertheless, the simple fact remains that "(p)opulation is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies." (Reynolds v. Sims, 377 U.S. 533, 567, supra.)

In the present case, population was neither "the starting point" nor " the controlling criterion." It is undisputed and indisputable that the board's sole consideration in fixing legislative districts was the preservation of existing town lines. It was only after the districts had been created and its lines fixed that any attempt was made to equalize the voting representation - an attempt which could not possibly succeed because of the nature of the plan.

Actually, the 13% deviation - described by the court as "minor" (Opinion, p.5) - neither indicates

nor reflects the potential for gross inequality of representation inherent in the scheme. Since the number of legislators from any town is determined by dividing its population by that of the smallest town and rounding off the result to the nearest whole number, the size of the deviation will vary arbitrarily from year to year, according to the size of the fraction to be rounded.[2] For example, had the plan been in effect in 1950, the deviation would have been 26%; in 1957, 22%; in 1963, 27% and in 1966, 26%. The potential for inequality

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2. In other words, if the population of each of the towns happen to approximate an integral multiple of that of Stony Point - as it does under the 1969 census - then, the deviation will be relatively small - for example, as in this case, 13%. More typically, however, the formula will require a rounding off of large fractions and will result, accordingly, in very much greater deviations.

inherent in the plan becomes even more apparent when one considers that an increase of only 3,000 in the population of Stony Point, assuming that the populations of the other towns remain constant, would change the deviation from the present 13% to more than 47%. In fact, it is theoretically possible for a plan such as the one before us to result in deviations approaching 100%.[3] And, since the plan rigidly fixes district lines - providing for no variation - there is no way to compensate for or minimize such extreme deviations.

---

3. This may be seen from the following example: if the smallest town, town A, had a population of 10,000, town B had 14, 999 and town C had 15, 001, then, under the plan, town C would have two representatives and town B would only have one, even though their populations were almost identical. The deviation in such a case would be 99.96%.

This, though does not mean that political subdivisions may not be taken into account when drawing legislative districts. I recognize, of course, that there may be historical and, perhaps, functional reasons for preserving the identity of the towns in a county legislative body - even though no such reasons have been shown in this case and even though the towns would remain independent, coordinate governments under any scheme. All that is required is that a plan be sufficiently flexible to give all the voters of the County an equal voice in its government. Population, as the Reynolds case indicates, need not be the only factor to be considered but it must be the controlling factor (377 U.S., at pp.579-580):

> "(N)either history along, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes. Considerations of area alone provide an insufficient justification for

deviations from the equal-population principle."

And, underscoring the same thought, the court went on to say (p.581):

> "(I)f, even as a result of a clearly rational state policy of according some legislative representation to political subdivisions, population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all of the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired."

Here, quite obviously, population was "submerged as the controlling consideration" in fixing the boundaries of the legislative districts and, consequently, the right of the county's citizens "to cast an effective and adequately

weighted vote (has been) unconstitutionally impaired."

That it is possible to reconcile the one man, one vote principle with the desire to preserve town identity in the county legislature is demonstrated by a proposal prepared by the League of Women Voters and put forward by several of the plaintiffs. Under this plan, all but three of the 18 members of the legislature would still represent districts located wholly within town lines and, as so apportioned, the maximum population deviation would amount to only 4%. Indeed, the plan approved in Town of Greenburgh v. Board of Supervisors (59 Misc 2d 152, affd. 25 N Y 2d 817) - upon which the court relies - illustrates an approach which could have been, but was not, followed here. Although it resulted in a deviation of 14%, slightly more than will result this year from the plan before us, the proposal in Greenburgh was held acceptable because town lines, while accorded weight, were not treated as

inviolate. In sharp contrast to the present case, the traditional town boundaries were disregarded where necessary in order to accommodate the essential interest of equal representation.

In sum, then, in view of the fact that the legislative districts were drawn strictly in accordance with town lines and without regard to population, it is evident that there was no effort, good faith or otherwise, to achieve "as nearly as practicable" equality of voting power. Since under the plan the weight of a citizen's vote varies depending on the town in which he lives and this variance is likely to increase in future years, the plan deprives the voters of equal protection of the laws and may not be constitutionally sustained.[4]

---

4. Having reached this conclusion, I find it unnecessary to treat the plaintiffs' further point that a multi-member districting scheme is unconstitutional on the ground that

However, in view of the imminence of the 1969 election and the fact that the plan achieves far greater equality than the existing board of supervisors form of county government, I would approve the plan as an interim measure and require the county legislature, to be elected next month, to formulate a further plan of apportionment consistent with constitutional standards. (See Honig v. Board of Supervisors, 24 N Y 2d 861, supra.)

---

4. (cont'd.) it "allocates greater voting power to voters in the most populous districts." (Banzhaf, Multi-Member Electoral Districts - Do They Violate the "One Man, One Vote" Principle, 75 Yale L. J. 1309, 1337; see Chavis v. Whitcomb, ___F. Supp. ___, ___, 38 USLW 2104 (decided by U.S. Dist. Ct. So. Dist. Ind., July 28, 1969); cf. Iannucci v. Board of Supervisors, 20 N Y 2d 244, 252, supra.) I merely note that, although the Supreme Court has, on several occasions, upheld the constitutionality of multi-member district plans, it has yet to pass upon the arguments

The order appealed from should be modified to the extent of directing that a new apportionment plan be adopted by the county legislature chosen in the 1969 election and, as so modified, affirmed.

* * * * * * *

Order affirmed, without costs. Opinion by Burke, J. All concur except Fuld, Ch. J., who dissents in part and votes to modify in an opinion in which Jasen, J., concurs.

---

4. (cont'd.) raised in the present case. (See, e.g., Burns v. Richardson, 384 U.S. 73; Fortson v. Dorsey, 379 U.S. 473.)

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 8th day of October in the year of our Lord one thousand nine hundred and sixty-nine, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

REMITTITUR October 8, 1969

2. No. 428 69

Samuel J. Abate,
Plaintiff-Appellant-Respondent,

-and-

June Molof & ors., & c.,
Plaintiffs-Intervenors-Appellants-Respondents,

-and-

Cornelius T. O'Sullivan, & ors.,
Plaintiffs-Intervenors-Appellants-Respondents,

-vs.-

Paul F. Mundt, & ors., & c.,
Defendants-Respondents-Appellants.

BE IT REMEMBERED, That on the 17th day of September in the year of our Lord one thousand nine hundred and sixty-nine, Samuel J. Abate, the plaintiff-appellant-respondent, and June Molof, & ors., & c., and Cornelius T. O'Sullivan, & ors., the plaintiffs-intervenors-appellants-respondents, in this cause, came here unto the Court of Appeals, by Barr & Barone, Doris Friedman Ulman, and Paul H. Rivet, their attorneys, and filed in the said Court Notices of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department.

And Paul F. Mundt, & ors., & c., the defendants-respondents-appellants in said cause, afterwards appeared in said Court of Appeals by J. Martin Cornell, their attorney, and also filed a Notice of Appeal

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Frank P. Barone, of counsel for the appellant-respondent, and by Mrs. Doris Friedman Ulman and Mr. John F. Banzhaf, III, of counsel for the intervenors Molof, & ors., and by Mr. Paul H. Rivet, of counsel for the intervenors O'Sullivan, & ors.,

and by Mr. J. Martin Cornell, of counsel for the respondents-appellants, and by Mr. Robert Imrie, of counsel for the Attorney General of the State of New York, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the same Supreme Court, before the Justices thereof, &c.

s/ RAYMOND J. CANNON
Clerk of the Court of
Appeals of the State of
New York

COURT OF APPEALS, CLERK'S OFFICE)
)
Albany, October 8, 1969.)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

s/ RAYMOND J. CANNON
Clerk.

District	Population	Population per Legislator	
Stony Point	12,114	12,114	0.3% over-represente
Haverstraw	23,676	11,838	2.5% over-represente
Ramapo	73,051	12,175	0.2% under-represente
Clarkstown	57,883	11,577	4.8% over-represente
Orangetown	52,080	13,020	7.1% under-represente

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IN THE

Supreme Court of the United States

October Term, 1969

FILED
JAN 7 1970
JOHN F. DAVIS, CLERK

No. 71

SAMUEL J. ABATE, as a Taxpayer of the County of Rockland, and as a Representative of Others Similarly Situated,

and

JUNE MOLOF, MINDY BAKER, GLORIA ENGLISH, JOYCE BRAZILLER, LINDA BERNS and JUDY BARTOSIK, as Individuals and as Representatives of Others Similarly Situated,

and

CORNELIUS T. O'SULLIVAN, ICHABOD F. SCOTT and MICHAEL J. CLARKE,

Petitioners,

against

PAUL F. MUNDT, PHILIP J. ROTELLA, JOHN B. LOVETT, JOHN F. MC ALEVEY, HAROLD K. GRUNE, constituting the Board of Supervisors of the County of Rockland, THE COUNTY OF ROCKLAND, and CHARLES FURST and MARION DORSEY, as Commissioners of the Board of Elections of the County of Rockland, and THE BOARD OF ELECTIONS OF ROCKLAND COUNTY,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR RESPONDENT IN OPPOSITION

J. MARTIN CORNELL
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Counsel for Respondents
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914 638-0500

December 31, 1969

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IN THE

Supreme Court of the United States

October Term, 1969

No. .....

SAMUEL J. ABATE, as a Taxpayer of the County of Rockland, and as a Representative of Others Similarly Situated,

and

JUNE MOLOF, MINDY BAKER, GLORIA ENGLISH, JOYCE BRAZILLER, LINDA BERNS and JUDY BARTOSIK, as Individuals and as Representatives of Others Similarly Situated,

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against

PAUL F. MUNDT, PHILIP J. ROTELLA, JOHN B. LOVETT, JOHN F. MC ALEVEY, HAROLD K. GRUNE, constituting the Board of Supervisors of the County of Rockland, THE COUNTY OF ROCKLAND, and CHARLES FURST and MARION DORSEY, as Commissioners of the Board of Elections of the County of Rockland, and THE BOARD OF ELECTIONS OF ROCKLAND COUNTY,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Supreme Court of the State of New York, dated July 21, 1969 and modified on July 30, 1969, is not reported. (App. at pages 12 and 28 of the Petition.)

The opinion and dissent of the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department, dated August 26, 1969, is reported at 33 A.D. 2d 660. (App. at page 30 of the Petition.)

The opinion and dissent of the Court of Appeals of the State of New York, dated October 8, 1969, is reported at 25 NY 2d 309. (App. at page 40 of the Petition.)

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

The only question presented is whether the plan of reapportionment implemented by a judgment of the Supreme Court of New York which provides for the election of legislators to the legislative body for the County of Rockland complies with the requirements of the Fourteenth Amendment of the United States Constitution.

Constitutional Provision Involved

The provision of the United States Constitution involved is Section One of the Fourteenth Amendment and is set forth in full in the Petition at page 5.

Statement of the Case

The County of Rockland in the State of New York is governed by a Board of Supervisors. The Board of Supervisors carries out the executive and legislative functions of County Government. The Board of Supervisors is composed of five supervisors, one being elected from each of the five towns within the County. The supervisor elected in each town serves as a member of the County Board of Supervisors by virtue of his election as the executive head of the governing body in the town. There are no cities in the County of Rockland. The population of each town within the County, as determined by a Federal Census in 1969, was as follows:

Stony Point	12,114
Haverstraw	23,676
Orangetown	52,080
Clarkstown	57,883
Ramapo	73,051
Total population	218,804

Upon the direction of the Supreme Court the County of Rockland adopted a plan of reapportionment that was approved by a judgment of that Court pursuant to an opinion dated July 21, 1969 and modified July 30, 1969. (App. at pages 12 and 28 of the Petition.) The plan of reapportionment provided that county legislators be elected from five districts within the County. The smallest district was allocated one legislator and the other legislators were allocated to each district in accordance with the population of that district. Thus, there was established one single-member district and four multi-member districts. In order to pre-

serve the integrity of the towns and to avoid fragmentation the district boundary lines and the town boundary lines were coterminous. A town supervisor elected within the town as the executive of the town government was also permitted to be elected to the County Legislature as a county legislator.

The plan of reapportionment provided for the election of eighteen legislators. The number of legislators to be allocated to each of the districts is determined by dividing the population of each, by the population of the smallest district. The number of legislators shall be the whole number resulting from that computation plus one for any major fraction.

For purposes of comparison as to representation between the districts a determination of the ideal representation can be computed by dividing the total population by the number of legislators, resulting in an ideal representation per legislator of 12,156. This figure of ideal representation can then be compared with the actual representation for each legislator to determine the extent of over or under representation as shown below.

District	*Population*	*Number of Legislators*	*Population per legislator*	*% of representation in relation to ideal representation*
Stony Point	12,114	1	12,114	0.3% over represented
Haverstraw	23,676	2	11,838	2.5% over represented
Orangetown	52,080	4	13,020	7.1% under represented
Clarkstown	57,883	5	11,577	4.8% over represented
Ramapo	73,051	6	12,175	0.2% under represented

The result of this computation shows that Orangetown is under represented by 7.1% and Clarkstown is over represented by 4.8%. This yields a maximum spread from the high to the low of 11.9%.

This plan of reapportionment was devised in good faith by the Board of Supervisors of Rockland County in an effort to comply with the rule of "one-man, one-vote" and at the same time to maintain the integrity of the towns which had been represented by the town supervisors sitting on the County Board for over a century.

The plan of reapportionment was implemented by a judgment of the Supreme Court and affirmed by the Appellate Division of the Supreme Court and the Court of Appeals.

The federal question sought to be reviewed herein was raised in the Supreme Court and discussed in the opinion of that Court (See App. at pages 12 and 28 of the Petition), and also in the Appellate Division of the Supreme Court and the Court of Appeals. In each stage of the proceedings, the parties raised the question of compliance with the Fourteenth Amendment of the United States Constitution.

ARGUMENT

I

The decision below is clearly correct.

The sole issue in this case is whether the population deviation for each county legislator is within permissible limits under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The highest Court in the State of New York held that based upon the facts in this case a spread between the smallest population per legislator and the largest population per legislator of 11.9% complied with the "as nearly as practicable" standard enunciated in *Reynolds* v. *Sims*, 377 U.S. 533.

The two recent decisions (*Kirkpatrick* v. *Preisler*, 394 U.S. 526 and *Wells* v. *Rockefeller*, 394 U.S. 542) struck down reapportionment plans which fell short of creating mathematical equality. However, this Court rejected any argument that there was a fixed numerical or percentage population variance established to satisfy without question the "as nearly as practicable" standard. The whole thrust of such a standard is inconsistent with the adoption of fixed permissible numerical population deviations. Population variances must be reviewed with regard to the circumstances of each particular case.

The Court of Appeals held that the population deviation in this case was justifiable for the purpose of maintaining the traditional and historical relationship between town and county government. Adherence to town lines and the allocation of legislators to each district in accordance with

population was a proper method of avoiding the fragmentation of towns which formerly had direct representation on the County Board of Supervisors. Thus, the Court of Appeals of New York has followed the standard relating to population variances laid down by this Court and applied it to the facts and circumstances surrounding the plan of reapportionment for Rockland County. The Court of Appeals has charted no new pathways in its approval of the plan of reapportionment for Rockland County. There are no new principles of law that have been established, but only the application of existing standards to particular facts and circumstances.

The Court of Appeals determined that the County of Rockland had made a good faith effort to achieve equality of representation and any variations in absolute equality were justified. Even the dissenting opinion in the Court of Appeals stated that the plan should not be rejected but should be approved as an interim measure since it achieved far greater equality than the existing Board of Supervisors form of government.

II

There is no conflict of decisions.

Petitioners assert that the decision of the Court of Appeals erroneously interprets the latest reapportionment decisions of this Court. Petitioners theorize that the Court of Appeals has drawn a distinction between permissible population variations on the Congressional, State and local level and, thus, this decision is in direct conflict with the decisions of the United States Supreme Court.

There is no such conflict and no amount of strained semantics can convert either the language of the Court of Appeals opinion or its actual application to the facts in this case into one warranting review by this Court. The Court of Appeals in reviewing the three levels of reapportionment—Congressional, State and local—has merely taken into account and weighed in the balance the different considerations and justifications at each level for variations from strict equality. In essence the Court has said that at the local level there may be a broader scope of permissible justifications for population deviation than at the Congressional level. The Court of Appeals clearly recognized the requirement for equality of population and described the plan in these terms. (App. at page 48 of the Petition.)

> "What the plan does is *not* to ignore population equality, but rather to achieve substantial equality within the context of a long-established town government framework, thus accommodating both constitutional and practical considerations * * * It represents a balanced bona fide application of the "one-man, one-vote" principle to the needs and circumstances of local government."

The dissent of Chief Judge Fuld in the Court of Appeals turned on the question of the permissible population variation. He is of the opinion that adherence to town boundaries is not a sufficient good faith justification for population deviation. However, the dissent does not discard the rationale for permitting justifiable population deviations since he cites with approval a population deviation of 14% which was upheld by the Court of Appeals involving Westchester County. (App. at page 67 of the Petition.) It is clear that both the majority opinion and the dissenting opinion would

not analyze population variations in a vacuum without any reference to proper justification for deviations.

The dissent by Chief Judge Fuld in essence is stimulated by a differing view of the factual justification in this case for the population deviation. The principle of law applied by the opinion of the majority and the dissent is the same but its application to the specific plan before the Court results in a divergence of views.

It is apparent that the Court of Appeals has followed the decisions of this Court and applied the standard of population equality to the facts and circumstances of this case. It is impossible to conjure up any conflict between the decision of the Court of Appeals and other decisions of this Court.

III

There is no important question of constitutional law.

Petitioners insist that hundreds of local legislative bodies in New York State alone will be affected by the Court of Appeals decision in this case and that millions of residents may lose their right to equal representation.

It is undoubtedly true that the rule of "one-man, one-vote" has had a significant impact on the method of representation at the local level and most of the counties in the State of New York in one manner or another have complied with the requirements for equal representation. However, it is difficult to perceive in what manner the application of the rule of equal representation in this case has to other local governments. There is no new important question

of law that must be settled by this Court. There is no significant or unique constitutional question lurking in the language of the Court of Appeals in this case. The petitioners set forth no citation of any pending litigation or even any indication of classes of hypothetical cases that would be affected by the Court of Appeals decision. The bald statement of the petitioners that millions of residents may lose their right to equal representation is not substantiated or explained.

The Court of Appeals in New York has been in the forefront in upholding the principle of "one-man, one-vote" and in fact applied the rule to local legislative bodies before this Court did so. The Court of Appeals has not established any new or important principle of law in this case. It has merely applied the principle of equal representation to the facts and circumstances of a particular county within the State. There is not the slightest taint of arbitrariness or discrimination in the reapportionment plan for Rockland County and there is a complete absence of any allegation of invidious discrimination.

This case does not, in any sense, involve any broad new legal principles that have application beyond the scope of the fact pattern in this particular case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

J. MARTIN CORNELL
County Attorney
Counsel for Respondents

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

Supreme Court, U.S.
FILED
APR 10
JOHN F. DAVIS

No. ~~4033~~ 71

SAMUEL J. ABATE, as a Taxpayer of the County of Rockland, and as a Representative of Others Similarly Situated,

—and—

JUNE MOLOF, MINDY BAKER, GLORIA ENGLISH, JOYCE BRAZILLER, LINDA BERNS and JUDY BARTOSIK, as Individuals and as Representatives of Others Similarly Situated,

—and—

CORNELIUS T. O'SULLIVAN, ICHABOD F. SCOTT and MICHAEL J. CLARKE,

Petitioners,

—against—

PAUL F. MUNDT, PHILIP J. ROTELLA, JOHN B. LOVETT, JOHN F. McALEVEY, HAROLD K. GRUNE, constituting the Board of Supervisors of the County of Rockland, THE COUNTY OF ROCKLAND, and CHARLES FURST and MARION DORSEY, as Commissioners of the Board of Elections of the County of Rockland, and THE BOARD OF ELECTIONS OF ROCKLAND COUNTY,

Respondents.

On Writ of Certiorari to the Court of Appeals of New York

BRIEF FOR PETITIONERS JUNE MOLOF *ET AL.*

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Section 1 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1033

SAMUEL J. ABATE, as a Taxpayer of the County of Rockland, and as a Representative of Others Similarly Situated,

—and—

JUNE MOLOF, MINDY BAKER, GLORIA ENGLISH, JOYCE BRAZILLER, LINDA BERNS and JUDY BARTOSIK, as Individuals and as Representatives of Others Similarly Situated,

—and—

CORNELIUS T. O'SULLIVAN, ICHABOD F. SCOTT and MICHAEL J. CLARKE,

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PAUL F. MUNDT, PHILIP J. ROTELLA, JOHN B. LOVETT, JOHN F. McALEVEY, HAROLD K. GRUNE, constituting the Board of Supervisors of the County of Rockland, THE COUNTY OF ROCKLAND, and CHARLES FURST and MARION DORSEY, as Commissioners of the Board of Elections of the County of Rockland, and THE BOARD OF ELECTIONS OF ROCKLAND COUNTY,

Respondents.

On Writ of Certiorari to the Court of Appeals of New York

BRIEF FOR PETITIONERS JUNE MOLOF *ET AL.*

Opinions Below

The opinion of the Supreme Court of the State of New York at Special Term dated July 21, 1969 and modified on July 30, 1969 (not yet reported), is set forth in the Appendix hereto, at pages A10 and A19.

The opinion and dissent of the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department dated August 26, 1969 and reported at 33 A. D. 2d 660 is set forth in the Appendix hereto, at pages A24 and A25.

The opinion and dissent of the Court of Appeals of the State of New York dated November 12, 1969, reported at 25 N. Y. 2d 309 is set forth in the Appendix hereto, at pages A34 and A42.

Jurisdiction

The order of the Court of Appeals of the State of New York was made and entered on November 12, 1969 and a copy thereof is set forth in the Appendix hereto, at page A31. The petition for a Writ of Certiorari was filed on January 5, 1970 and granted on February 24, 1970. The jurisdiction of this Court rests upon 28 USCA 1257 (3).

Constitutional Provision Involved

The provision of the United States Constitution involved in the determination of this case is Amendment XIV, Section 1, which states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

No other statutes, rules or regulations are involved.

Questions Presented

The Board of Supervisors of the County of Rockland was ordered to reapportion itself "with all deliberate speed" by an order of the Supreme Court of the State of New York at Special Term on June 2, 1969. On July 8, 1969, the Board of Supervisors submitted to Special Term for approval a reapportionment plan providing for multi-member districting. Rockland County is made up of five towns. There are no cities in Rockland County. The populations of the several towns vary enormously, as shown by the latest (1969) Federal census:

Stony Point	12,114
Haverstraw	23,676
Orangetown	52,080
Clarkstown	57,883
Ramapo	73,051
Total Population	218,804

The multi-member district plan submitted by the Board of Supervisors of Rockland County on July 8, 1969, provides that each town shall be a district. Using the smallest town, Stony Point, as a base, each town is allocated as many legislators as its population is a multiple of the Town of Stony Point. Thus, the Town of Stony Point is allocated one legislator; the Town of Haverstraw, two;

the Town of Orangetown, four; the Town of Clarkstown, five; the Town of Ramapo, six; making a total of eighteen county legislators. The number of legislators would be subject to change as the population of each town shifts or increases.

Unfortunately, the towns within Rockland County are not exact multiples of the Town of Stony Point, so that the residents of the various towns do not have equal representation on their county legislature. The following table shows the percentage of representation per district, using the 1969 Federal census figures set forth above and the mathematical formula of *Kirkpatrick* v. *Preisler*, 394 U. S. 535, 89 S. Ct. 1225, for determining the difference in population equality:

District	*Population*	*Number of Legislators*	*Population per Legislator*		*Percentage Deviation*
Stony Point	12,114	1	12,114	0.3%	over-represent
Haverstraw	23,676	2	11,838	2.5%	over-represent
Orangetown	52,080	4	13,020	7.1%	under-represent
Clarkstown	57,883	5	11,577	4.8%	over-represent
Ramapo	73,051	6	12,175	0.2%	under-represent

Thus, there is an 11.9 per cent deviation between the highest and the lowest population per legislator (Orangetown is 7.1 per cent below the mathematical ideal and Clarkstown is 4.8 per cent above the mathematical ideal).

The Rockland County Board of Supervisors has not made a good-faith effort to achieve precise mathematical equality. Instead of reapportioning the county legislature with a view toward equal representation for equal numbers of people, the Board first set up its districts as being coterminous with existing town boundaries and let the population deviations fall where they may.

The questions presented are:

1. Is the multi-member district plan proposed by the Board of Supervisors of Rockland County constitutional and, in fact, is any multi-member district plan wherein the district lines are static but the population within each district is subject to change, constitutional?

2. Is the population deviation of 11.9 per cent between the highest and lowest population per legislator consistent with the rulings of this Court in determining equal representation for equal numbers of people?

3. Has the Board of Supervisors of Rockland County made a good-faith effort to achieve precise mathematical equality as required by the rulings of this Court?

Statement

The legislative body of the County of Rockland has statutorily and traditionally been composed of five supervisors, being the duly elected supervisors of each of the five towns, each supervisor having one vote on the County Board. On or about July 12, 1965, an action was commenced by John Lodico, Sr., in the New York State Supreme Court for the County of Rockland to compel the Board of Supervisors to formulate a plan whereby the vote of each Supervisor would be proportionate to the number of persons he represents within his township. The defendant Board of Supervisors removed the action to the U. S. District Court for the Southern District of New York. A request to convene a panel of three judges was granted and after argument heard by the panel, a decision and order was rendered by the Honorable Thomas F. Croake, dated May 20, 1966, declaring the Board of Supervisors to be unconstitutional and ordering the Board of Supervisors to submit a plan of reapportionment to the voters at the November, 1966, election, consistent with

the "one-man, one-vote" doctrine. (*Lodico* v. *Board of Supervisors of Rockland County,* 256 F. Supp. 442). In compliance with this order, the Board established a reapportionment commission which submitted two plans to the Board for consideration. Plan A was a single-member district plan of 16 districts plus the five town supervisors; Plan B was a multi-member district plan which was identical to the plan now before this Court. A public hearing was held to consider Plan B. The testimony was overwhelmingly in favor of Plan A. Subsequently, a new plan was proposed called Plan S, which was a single-member district plan consisting of nine districts with no supervisors serving. At a public hearing on Plan A, the speakers preferred Plan S with a second choice of Plan A. In spite of this, the Board of Supervisors adopted Plan B and placed it on the ballot in November, 1966. It was defeated by the electorate.

In February, 1967, a public hearing was held to consider 1) Plan B, 2) Weighted Voting, 3) County-at-large Plan, 4) Plan S, which had been changed to 17 single-member districts with no supervisors serving. Most of the testimony was in favor of Plan S. A special election was held in April, 1967 with Plan B again on the ballot as well as Plan S. Both were defeated. The criticism of Plan S was that there was no provision for a transitional period and without a County Executive (Rockland County does not have charter government) there would be 17 neophytes serving on the legislature without experience or direction.

Toward the end of 1967, a new reapportionment commission was created. The commission again proposed a 17-member, single-member district plan.

On or about September 26, 1968, Samuel J. Abate, one of the petitioners herein, commenced an action in the New

York State Supreme Court for the County of Rockland, inter alia, to compel the Board of Supervisors to place this reapportionment plan on the ballot at the general election in November, 1968. Defendant Board of Supervisors moved to dismiss the action on the ground of res judicata in that jurisdiction remained with the U. S. District Court. On October 10, 1968, a decision was rendered by the Honorable Joseph F. Gagliardi, Justice of the New York State Supreme Court, staying the State Court action pending a determination by the Federal Court as to its jurisdiction.

In December, 1968, a public hearing was held to consider the single member district plan and a weighted voting plan. Again, the support was overwhelmingly for the single-member district plan. On March 11, 1969, the Board of Supervisors enacted an interim weighted voting plan of reapportionment. On March 12, 1969, a decision was made by Justice Gagliardi accepting jurisdiction of the Abate action based upon a letter transmitted to him by Judge Croake stating that the Federal Court action terminated when the Board of Supervisors submitted a plan of reapportionment to the voters in November, 1966.

On March 14, 1969, the Board of Supervisors submitted its weighted voting plan to the State Supreme Court for approval. On April 16, an order was issued by the Honorable Joseph F. Hawkins, Justice of the New York State Supreme Court, permitting June Molof et al., one of the petitioners herein, to intervene as party-plaintiffs in the action. On May 28, 1969, the weighted voting plan was declared unconstitutional by order of Justice Hawkins, and the Board of Supervisors was directed to submit a new plan to the Court for implementation at the November, 1969, election.

Shortly thereafter, a reapportionment subcommittee of the Charter Commission adopted an 18-member single-

member district plan, with the town supervisors serving for an interim period of two years only. At the following meeting of the Commission, and without apparent reason, this plan was rescinded and the multi-member district plan now before the Court was adopted. One of the members of the Commission resigned in protest and declared that political pressure had been brought to bear on some of the members to persuade them to change their votes in favor of the multi-member district plan. Seven of the 17 commission members filed a minority report in favor of the 18-member single-member district plan.

On June 24, 1969, the Board of Supervisors enacted Resolution No. 311 of 1969 (A1) proposing said multi-member district plan, and it was submitted to Justice Hawkins for approval on July 8, 1969. On July 9, 1969, petitioners Cornelius T. O'Sullivan et al. were granted leave to intervene as party-plaintiffs.

In a decision dated July 21, 1969 and modified July 30, 1969 (A10 and A19) Justice Hawkins approved the multi-member district plan proposed by the Board of Supervisors. All plaintiffs to this action, who are now petitioners herein, objected to the plan as being unconstitutional, based upon the Fourteenth Amendment to the U. S. Constitution and the decisions of this Court.

All plaintiffs appealed this decision to the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department. In a decision dated August 26, 1969 (A24), the Appellate Division affirmed the lower court decision, the late Honorable George J. Beldock, Presiding Justice of said Court, dissenting (A25). Basing his dissent on two recent U. S. Supreme Court decisions on reapportionment, *Wells* v. *Rockefeller*, 394 U. S. 542 and *Kirkpatrick* v. *Preisler*, 394 U. S. 526, Justice Beldock held that the 11.9 per cent variance between the highest and the lowest population per legislator in

Rockland County did not satisfy the "one-man, one-vote" principle inasmuch as the Board of Supervisors did not adequately justify the reasons for such variance. He therefore concluded that the plan was unconstitutional.

The decision of the Appellate Division was appealed by all plaintiffs to the Court of Appeals of New York. The Court of Appeals affirmed the decision of the Appellate Division in an opinion dated November 12, 1969 (A34), the Honorable Stanley H. Fuld, Chief Judge of said Court and the Honorable Matthew J. Jasen, Associate Judge of said Court, dissenting (A42). In his dissent, in which Judge Jasen concurred, the Chief Judge rejected the conclusions of the majority of the Court which held that although the permissible variation in population between congressional districts is "almost micrometric", the permissible deviations in the apportionment of state legislatures is broader and in the apportionment of local legislative bodies even broader than those of state legislatures. Judge Fuld stated (A43), "the very same rationale which requires that all votes be accorded equal weight in elections to Congress and state legislatures demands rigorous adherence to the one man, one vote principle in a county-wide election of its legislative body. A resident and voter is undoubtedly concerned with the actions of his county or municipal legislature, as he is with those of Congress or the state legislature."

In addition, Judge Fuld asserted that the potential for inequality inherent in the plan made it not only undesirable, but constitutionally invalid. Alluding to a chart submitted by petitioners June Molof et al., he noted that if the plan had "been in effect in 1950, the deviation would have been 26%; in 1957, 22%; in 1963, 27%; and in 1966, 26%." (A47)

All plaintiffs to this action petitioned this Court for a Writ of Certiorari on January 5, 1970. Certiorari was granted on February 24, 1970.

The multi-member district plan now in question was implemented at the general election in November, 1969, and the County Legislature of Rockland County is now sitting pursuant thereto.

Summary of Argument

The Court of Appeals of New York has approved a multi-member district plan of reapportionment for Rockland County which petitioners believe is unconstitutional under the principle of equal representation for equal numbers of people. Under this plan, the deviation between the highest and lowest population per legislator is 11.9 per cent, a figure much higher than that rejected by this Court in *Kirkpatrick* v. *Preisler,* 394 U. S. 535. *Kirkpatrick* is applicable to districting of local legislative bodies, not only to congressional districting because it is merely a definition of the "as nearly as is practicable" standard set forth in *Wesberry* v. *Sanders,* 376 U. S. 1. This standard was applied to local legislatures in *Avery* v. *Midland County,* 390 U. S. 474; therefore, any definition of that standard should likewise be applied to local legislatures.

Under the ruling of *Kirkpatrick,* it is incumbent upon a legislature to show that a good-faith effort has been made to achieve precise mathematical equality. Respondents have failed to show such good-faith effort. They initially created district lines as being coterminous with town boundary lines without regard to population figures or equality of representation. Petitioners, on the other hand, have presented a single-member district plan in which they have made a good-faith effort to achieve precise equality and, in fact, have produced a districting map in which there is only a 3.5 per cent deviation between the highest and lowest population per legislator.

Any multi-member district plan in which district boundaries are static but the population within each district

is subject to change, is invalid because of the possibility for inequality inherent in such a plan. If Rockland County had had such a plan in prior years, the inequality of representation would have been very great (see petitioner's brief, pg. 22), as indeed it could be in any such plan.

ARGUMENT

I.

Rockland County's multi-member district plan is unconstitutional under the "one-man, one-vote" doctrine.

The "one-man, one-vote" principle was originally set by this Court in *Wesberry* v. *Sanders*, 376 U. S. 1 (1964), a congressional districting case, in which a Georgia statute was declared invalid because the population in each district created by that statute was so disproportionate that a resident in one district did not have an equal voice in the election of his representative as did a resident in another district. This Court stated that "as nearly as is practicable" one man's vote is to be worth as much as another's.

This principle, originally applied only to congressional districting, was extended to the apportionment of state legislatures in *Reynolds* v. *Sims*, 377 U. S. 533 (1964). In Reynolds, this Court held that the Equal Protection Clause of the Fourteenth Amendment to the U. S. Constitution guarantees to each voter an equal voice in his state government. The Court stated:

> "As long as ours is a representative form of government and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators

> in a free and unimpaired fashion is a bedrock of our political system. It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislature. And, *if a state should provide that the votes of citizens in one part of the state should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the state, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted.*" (Emphasis added.)

Again, the Reynolds case involved glaring discrepancies among the populations of the various districts.

This Court applied the basic principle of *Wesberry* to units of local government in *Avery* v. *Midland County*, 390 U. S. 474 (1968), and held that every person voting for a local legislator has the right to a vote of substantially equal weight to every other vote so cast.

In 1969, this Court was faced with the problem of defining the "as nearly as is practicable" standard set forth in Wesberry. *Kirkpatrick* v. *Preisler*, 394 U. S. 526 (1969) and *Wells* v. *Rockefeller*, 394 U. S. 535 (1969) involved congressional redistricting in Missouri and New York, respectively. For the first time the Court was faced with districts in which there were not glaring discrepancies of population, but rather small percentage deviations. In *Kirkpatrick*, for example, the most populous district was 3.13 per cent above the mathematical ideal, and the least populous was 2.83 per cent below, amounting to a 5.96 per cent variance between the highest and lowest population per legislator. The ratio of the largest to the smallest district was 1.06 to 1.

The Court rejected the Missouri and New York plans on the grounds that each state had not made a "good-faith effort to achieve precise mathematical equality"; that unless population variances are shown to have resulted despite such effort, "the State must justify each variance, no matter how small." The Court stated:

> "Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives. Toleration of even small deviations detracts from these purposes."

In the case at bar, the Rockland County Board of Supervisors has proposed a reapportionment scheme of multi-member districting in which the percentage deviation between the highest population per legislator and the lowest population per legislator is 11.9 per cent (petitioner's brief, pg. 4), a figure much higher than that rejected by the Court in *Kirkpatrick*, supra. The resident in the district of Orangetown which is 7.1 per cent below the mathematical ideal does not have equality of representation with the resident of the district of Clarkstown, which is 4.8 per cent above the mathematical ideal.

The Rockland County Board of Supervisors has relied on *Fortson* v. *Dorsey*, 379 U. S. 433 and *Burns* v. *Richardson*, 384 U. S. 73, to prove the validity of its multi-member district plan. It is respectfully submitted that both cases are distinguishable from the one at bar. In the *Fortson* case, this Court held that "Where the requirements of *Reynolds* v. *Sims* are met," a multi-member district scheme will not be held invalid unless invidious discrimination, either racial or political, is shown. Indeed, the districts were substantially equal. Clearly, in the Rockland County plan, the requirements of *Reynolds* v. *Sims* and related cases have not been met. The districts are

far from equal. In addition, in the *Fortson* case, although state senators were elected at large within the county, each senator was required to be a resident of his own senatorial district. Thus, geographical distribution of senators throughout each highly populous county was assured, although the senators were elected at large by the constituents of the entire county. In the Rockland County plan, such residence requirements do not exist. It is entirely possible, for example, that all six representatives allocated to the Town of Ramapo could reside within the village of Spring Valley. Thirdly, in the *Fortson* case, multi-member districts were utilized in only one house of a bicameral legislature. In Rockland County, there is only a unicameral legislative body.

Burns v. *Richardson*, supra, was decided in the year 1966, three years prior to the holdings of *Kirkpatrick* and *Wells*. Moreover, the redistricting scheme was based on *voters* per district, not on population per district.

It has been contended by respondents that the *Kirkpatrick* and *Wells* cases apply only to congressional districting and only to single-member, not multi-member district plans. Both arguments are spurious.

As heretofore cited, the basic principle of "one-man, one-vote" was originally applied to congressional districting and later extended to state and local districting. It logically follows, therefore, that any definition or elucidation of the basic principle would naturally apply to any case which is an extension of that principle. In fact, in *Hadley* v. *The Junior College District of Metropolitan Kansas City, Mo.*, decided February 25, 1970, this Court stated:

> "• • • that in situations involving elections, the states are required to insure that each person's vote counts as much, in so far as it is practicable,

> as any other person's. We have applied this principle in congressional elections, state legislative elections, and local elections."

The Court, therefore, reiterated the "as nearly as is practicable" standard as applying to congressional, state and local districting. Indeed, the definition of that standard would necessarily apply to congressional, state and local districting.

If respondents' second contention is accepted, that the foregoing principle applies only to single-member district plans and not to multi-member district plans, then it would follow that residents in areas having multi-member district plans are not entitled to equal representation but residents in areas of single-member districts, are. How simple it would be for any legislature, either state or local, to circumvent the mandate of this Court by merely creating a system of multi-member rather than single-member districting. It is respectfully submitted that this Court never intended such a result.

II.

The Rockland County Board of Supervisors has not made a good-faith effort to achieve precise mathematical equality of representation.

Respondents have not shown that a good-faith effort has been made to achieve precise mathematical equality. Indeed, as compared with the 11.9 per cent deviation of the present plan, petitioners have proposed a plan having only a 3.5 per cent deviation. Respondents' only rationale for implementing the multi-member district plan is to retain town boundaries as county legislative districts. This concept was rejected by this Court in *Wells* v.

Rockefeller, supra, where the New York State legislature tried to justify its mathematically unequal districts by stating that one of the purposes of its redistricting scheme was to retain certain county lines as district boundaries. The Court stated:

> "To accept a scheme such as New York's would permit groups of districts with defined interest orientations to be overrepresented at the expense of districts with different interest orientations. Equality of population among districts in a sub-state is not a justification for inequality among all the districts in the State. Nor are the variations in the 'North country' districts justified by the fact that these districts are constructed of entire counties."

Respondents have not shown sufficient reasons for retaining town lines as boundaries for their districting plan. They claim that county government cannot operate effectively and efficiently without town representation. This reasoning negates the basic premise underlying county government, which is the management of and services to the county as a whole, not to individual townships. Each town has its own government to fulfill the basic needs of its constituency, and town problems should not be delegated to the county as a whole.

It is true that traditionally and historically in New York State, county legislatures were composed of the supervisors of the individual towns. But the reason for this was that counties were small and had few powers. In fact, in areas where counties still perform relatively few functions, this reasoning would still prevail. However, Rockland County is no longer in that category. According to the 1969 Federal census, the population of Rockland County is 218,804. Its budget for the fiscal year 1970 is approximately $30 million. Its services include

road-building, sewers, health, mental health, and the like. Measures have been proposed for a county police force and a county transportation authority. Certainly, Rockland cannot be considered a small, rural community. Its legislature should be concerned only with county problems, not town problems.

In many instances, town representation on the county legislature, as heretofore existed, has been detrimental to the county as a whole.

In the construction of the county sewer system, the county is responsible for the trunk lines and each town constructs its own lateral connections. Thus one job has been in the hands of six diverse authorities, each responsible for letting its own contracts, with the result that charges to the residents of each town have not been as proportionately equal as they might have been had one authority—the county—been in full charge.

In another area, the Metropolitan Transportation Authority proposed an enlarged airport for the county. The town-oriented legislature turned the proposal down, basing its action not on whether the county needed the airport but rather on the fact that no town wanted it in its own backyard.

Proponents of a town-oriented county legislature hold that towns should have a voice on the county level in determining tax equalization rates. Yet, as a practical matter, the county legislature has eschewed a voice in this matter and has always accepted the figures proposed by the State of New York for determining these rates.

Respondents allege the necessity for liaison between town and county government in order to facilitate the establishment of joint facilities and joint services. But there is no reason to assume, and the respondents have not stated any reason, that a county representative elected

from a single-member district will have less interest in the establishment of joint facilities and joint services than will a county representative elected from the township as a whole. In fact, the county representative elected at large from the township has no greater knowledge of or control over the town government than does the representative of the single-member district. He is not a town officer and therefore cannot influence the government of the town.

It is obvious from the foregoing that respondents have not shown that they made a "good-faith effort" to achieve equality of representation. As stated by the Honorable Stanley H. Fuld, Chief Judge of the Court of Appeals of New York, in his dissent to the majority opinion in this case (A47):

> "I recognize, of course, that there may be historical and, perhaps, functional reasons for preserving the identity of the towns in a county legislative body—even though no such reasons have been shown in this case and even though the towns would remain independent, coordinate governments under any scheme. All that is required is that a plan be sufficiently flexible to give all the voters of the County an equal voice in its government. Population, as the *Reynolds* case indicates, need not be the only factor to be considered but it must be the *controlling* factor * * * Here, quite obviously, population was 'submerged as the controlling consideration' * * *."

III.

A multi-member district plan is unconstitutional if its district lines are static but its population is subject to change.

Any multi-member district plan, such as the one presently before this Court, wherein the district lines are static but the population within each district in subject to change, is inherently unconstitutional. The reason for this is that at any given time, due to increases or shifts in population among the districts, the percentage deviation between the highest and lowest population per legislator could conceivably be so great as to render the plan invalid without regard to whether a good-faith effort has indeed been made by the proponents.

For example, if the multi-member district plan had been in effect in Rockland County since 1950, the deviation between the highest and lowest population per legislator would have been 26 per cent in 1950, 22 per cent in 1957, 6 per cent in 1960, 27 per cent in 1963, 26 per cent in 1966 and 12 per cent in 1969 (see petitioner's brief, pg. 22). Thus, in four of the six census years, population deviations would have far exceeded 20 per cent. Projecting this plan into the future, according to population figures supplied by the Rockland County Planning Board for the year 1980, the deviation would be 52 per cent (population of Stony Point, 18,000; Haverstraw, 27,500; Clarkstown, 80,000; Orangetown, 62,500; Ramapo, 112,000).

The possibilities for inequality inherent in such a multi-member district plan are infinite. As noted by Chief Judge Fuld (footnote, pg. A47), it is conceivable that there could be as much as a 99.96 per cent deviation under certain circumstances. To permit this type of plan to exist, would

be an invitation to constant legal action inasmuch as it could be contested every time population figures are shown to create large inequalities. Petitioners believe that a legislative reapportionment scheme should not be subject to constant constitutional question but should be flexible enough to meet the needs of population changes.

IV

The only valid reapportionment plan for Rockland County is the single-member district plan.

Petitioners believe that there is only one constitutionally valid and representative form of government for Rockland County—the single-member district plan. Under this plan, the entire county would be divided into districts of substantially equal population, each district being allocated one legislator. This plan has certain advantages not obtainable under other systems of apportionment:

1. It would insure complete compliance with this Court's mandate of "one-man, one-vote."

2. Since each district would be comparatively small, it would permit representation from each area of the county on an equal basis and afford each resident an opportunity to be heard by his district legislator.

3. The small districts would lure qualified persons within each district to run for the office of county legislator who would not otherwise have either the funds or the time to run for the same post on a town-wide basis.

4. The number of legislators would not be subject to change, but an impartial commission could be created to change district boundaries as shifts or increases in population occur. Under the multi-member district plan,

the number of legislators could increase to such an extent that it would become unwieldly in addition to the drain it would create on the county budget.

5. The majority of the public has been in favor of this plan since the Board of Supervisors was ordered to reapportion itself in 1966. As stated heretofore, not only the public, but two reapportionment commissions, have supported the single-member district plan; yet, the Board of Supervisors has refused to accept their recommendations.

Petitioners have prepared an 18-member, single-member district map based upon the 1969 Federal Census population figures. The deviation between the highest and lowest population per legislator under this plan would be 3.5 per cent. In addition, the map was drawn with a view to keeping individual villages as districts wherever possible and to keeping town lines intact. In fact, town lines were crossed in only three of the 18 districts and one of these was in order to keep the villages of the Nyacks intact.

CONCLUSION

The Rockland County multi-member district plan should be invalidated because it does not afford equal representation for equal numbers of people under the rulings of this Court. Moreover, any multi-member district plan in which the district boundaries are not subject to change but the population within each district is, should be invalidated because of the possibilities for inequality inherent in the nature of the plan. A single-member district plan should be implemented in Rockland County similar to the one proposed by petitioners in its map appended hereto.

Respectfully submitted,

Doris Friedman Ulman,
Counsel for Petitioners,
June Molof, et al.

Population Table

Town	*1950*	*1957*	*1960*	*1963*	*1966*	19
Stony Point	5,485	8,132	8,739	10,316	11,704	12
Haverstraw	12,979	15,073	16,632	17,538	20,659	23
Orangetown	34,554	39,034	43,172	47,051	49,852	50
Clarkstown	15,674	24,280	33,196	42,749	51,883	57
Ramapo	20,584	27,264	35,064	44,375	58,626	73

Population Per Legislator

Town	*1950*	*1957*	*1960*	*1963*	*1966*	19
Stony Point	5,485	8,132	8,739	10,316	11,704	12
Haverstraw	6,490	7,537	8,316	8,769	10,330	11
Orangetown	5,776	7,807	8,634	9,410	12,463	13
Clarkstown	5,225	8,093	8,299	10,687	12,971	11
Ramapo	5,146	9,088	8,766	11,094	11,725	12

Ratio of Largest to Smallest Population Per Legislator

1950	1.26 to 1
1957	1.22 to 1
1960	1.06 to 1
1963	1.27 to 1
1966	1.26 to 1
1969	1.12 to 1

IN THE

Supreme Court of the United States

October Term, 1969

APR 14 1970
JOHN F. DAVIS, CLERK

No. 71

SAMUEL J. ABATE, as a Taxpayer of the County of Rockland, and as a Representative of Others Similarly Situated,

and

JUNE MOLOF, MINDY BAKER, GLORIA ENGLISH, JOYCE BRAZILLER, LINDA BERNS and JUDY BARTOSIK, as Individuals and as Representatives of Others Similarly Situated,

and

CORNELIUS T. O'SULLIVAN, ICHABOD F. SCOTT, and MICHAEL J. CLARKE,

Petitioners,

against

PAUL F. MUNDT, PHILIP J. ROTELLA, JOHN B. LOVETT, JOHN F. McALEVEY, HAROLD K. GRUNE, constituting the Board of Supervisors of the County of Rockland, THE COUNTY OF ROCKLAND, and CHARLES FURST and MARION DORSEY, as Commissioners of the Board of Elections of the County of Rockland, and THE BOARD OF ELECTIONS OF ROCKLAND COUNTY,

Respondents.

BRIEF FOR PETITIONERS — CORNELIUS T. O'SULLIVAN, ICHABOD F. SCOTT AND MICHAEL J. CLARKE

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APRIL 10, 1970

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Supreme Court of the United States

October Term, 1969

No. 1033

SAMUEL J. ABATE, as a Taxpayer of the County of Rockland, and as a Representative of Others Similarly Situated,

and

JUNE MOLOF, MINDY BAKER, GLORIA ENGLISH, JOYCE BRAZILLER, LINDA BERNS and JUDY BARTOSIK, as Individuals and as Representatives of Others Similarly Situated,

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Respondents.

BRIEF FOR PETITIONERS — CORNELIUS T. O'SULLIVAN, ICHABOD F. SCOTT AND MICHAEL J. CLARKE

Opinions Below

The opinion of the Supreme Court of the State of New York at Special Term dated July 21, 1969 (A10) and modified on July 30, 1969 (A19).

The opinion and dissent of the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department, dated August 26, 1969 (A24) is reported at 33 A. D. 2nd 660.

The opinion and dissent of the Court of Appeals of the State of New York dated October 8, 1969 (A34) is reported at 25 New York 2nd 309.

Jurisdiction

The order of the Court of Appeals of the State of New York was made and entered on October 8, 1969 (A31). The jurisdiction of this Court was invoked under Section 28 USCA 1257 (3). The petition for a writ of certiorari was filed on January 5, 1970 and granted on February 24, 1970.

Constitutional Provisions Involved

The provision of the United States Constitution involved in the determination of this case is Amendment XIV, Section 1, which states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented

1. Is the multi-member district plan proposed by the Board of Supervisors of Rockland County constitutional?

2. Is the population deviation of 11.9% between the highest and the lowest population per legislator consistent with the rulings of this Court in determining equal representation for equal numbers of people?

3. Has the Board of Supervisors of Rockland County made a good faith effort to achieve precise mathematical equality as required by the rulings of this Court?

Statement of the Case

The legislative body of the County of Rockland has statutorily been composed of the five town supervisors elected in each of the 5 towns of the County of Rockland. Early in 1966 the County of Rockland was directed by the Federal District Court for the Southern District of New York to reapportion the County of Rockland. *Lodico* v. *Board of Supervisors,* 256 Fed. Supp. 442.

The present action was instituted by the petitioner Samuel Abate in the Supreme Court of the State of New York on September 30, 1968 requesting that the Board of Supervisors adopt and submit to the voters a 17-member single member district plan.

Petitioners June Molof et al. were granted leave to intervene as party plaintiffs by the Supreme Court of the State of New York on April 14, 1969 on which date the defendant Board of Supervisors presented to said Court for approval an interim plan of weighted voting. The Honorable Joseph F. Hawkins, Justice of the Supreme Court of the State of New York pursuant to an order made on May 28, 1969 and entered on June 2nd, 1969 held that the interim weighted voting plan was unconstitutional and directed the Board of Supervisors to pre-

sent to the Court a proposed plan of reapportionment "with all deliberate speed."

On July 8, 1969 a reapportionment plan, resolution 311 of the County of Rockland for 1969 (A1) was submitted to the Court providing for multi-member districts. On July 9, 1969 petitioners Cornelius T. O'Sullivan, Ichabod F. Scott and Michael J. Clarke were permitted to intervene as party plaintiffs.

The plan submitted by the County of Rockland in accordance with resolution 311 established multi-member districts made up of the existing townships in the County of Rockland and established 18 county legislative seats to be apportioned among the 5 towns. District 1, Stony Point, 1 legislator; District 2, Haverstraw, 2 legislators; District 3, Ramapo, 6 legislators; District 4, Clarkstown, 5 legislators, and District 5, Orangetown, 4 legislators.

This decision was appealed to the Appellate Division which on a decision dated August 26, 1969 found without opinion (A22 and A24). The presiding Justice of the Appellate Division, Second Judicial Department, the Honorable George J. Beldock (A25) dissented from the holding of the Trial Court relying largely upon the decisions of this Court in *Wells* v. *Rockefeller*, 394 U. S. 542 and *Kirkpatrick* v. *Preisler*, 394 U. S. 526, to the effect that the County must justify any variation no matter how small from precise mathematical equality and indeed must make a good faith effort to achieve precise mathematical equality.

The decision of the Appellate Division was appealed by all the plaintiffs to the Court of Appeals of the State of New York. The Court of Appeals affirmed the lower Court's decision in an opinion dated November 12, 1969 (A34), the Chief Justice of the Court of Appeals, the Honorable Stanley H. Fuld, and the Honorable Matthew

J. Jasen, Associate Justice of said Court dissenting (A42). The majority opinion written by the Honorable Associate Justice Adrian Burke (A34) contends, in part, that the equal protection clause of the Constitution permits minimal variation or a stringent application of mathematical equality in Congressional districts, a more tolerant attitude in apportioning State legislatures and yet a greater premissiveness in deviation from strict population equality in local legislative bodies (A38).

The dissent of the Honorable Stanley H. Fuld rejected the conclusions of the majority of the Court of Appeals and held that the permissible variations between Congressional districts is "almost micrometric", and the permissible deviations in the apportionment of other governmental bodies cannot be any different.

The dissent also concluded that the 11.9% variation in this case was not de minimis and that the Board of Supervisors had not made a good faith effort to achieve absolute equality as mandated by the Supreme Court.

Summary of Argument

That the petitioners, O'Sullivan, Scott and Clarke, are injured parties in that their representation in the County legislature in substantially less than that of the residents of the adjoining township.

That the Supreme Court has held that the "Equal protection" clause of the Constitution is applicable to all levels of government and the county of Rockland falls within said protected area.

That the standards of equality must be based upon a "good faith" effort to achieve precise mathematical equality. That no such effort has been made by the County of Rockland and the variations existent are not de minimus.

That multi-member districts are constitutional under certain conditions, that is when they do not breach the standards established by this Court for equal representation.

That unique natural boundaries may permit a wider variance in population equality under limited circumstances.

That the doctrine of Stare decisis has applicability to this case as we seek to have the body of law relating to "one man-one vote" applied to the facts of this case.

ARGUMENT

I

Petitioners Cornelius T. O'Sullivan, Ichabod F. Scott and Michael J. Clarke are properly aggrieved parties with standing to sue.

Petitioner Michael J. Clarke is a resident of the Hamlet of Orangeburg in the Town of Orangetown, County of Rockland, State of New York. He is a duly elected town councilman in the Town of Orangetown.

Petitioner Ichabod F. Scott is a resident and taxpayer of the Hamlet of Orangeburg, Town of Orangetown, County of Rockland, State of New York, and is Chairman of the Board of Fire Commissioners of the Orangeburg Fire District in said Town of Orangetown, County of Rockland State of New York.

Cornelius T. O'Sullivan is a resident taxpayer of the Hamlet of Pearl River, in the Town of Orangetown, County of Rockland, State of New York.

These petitioners intervened in this case as each of them are resident taxpayers of the Township of Orange-

town in the County of Rockland which is the township that is underrepresented in the legislative distribution (A36). Thus, these petitioners are the only petitioners who clearly suffer an injury or harm due to the decision of the former Board of Supervisors of the County of Rockland in adopting this multi-member district plan with the population spread as it exists in the County of Rockland (A43).

II

Equal protection clause of the Constitution of the United States requires that one-man one-vote standard apply equally at all levels of government.

The entire thrust of the decisions of this Court begun in 1964 has been to recognize that *all* levels of government are in effect merely extensions of the people who must be fairly represented and have equality in the election of their representatives—to do less would indeed have been to rob us of those liberties so prized by their absence in many parts of the world.

As this Court said very clearly in *Wesberry* v. *Sanders*, 376 U. S. 1 (6, 7):

> ". . . that nothing in the language of that article gives support to a construction that would immunize State Congressional apportionment laws which debase a citizen's right to vote from the power of Courts to protect the constitutional rights of individuals from legislative destruction, a power recognized at least since our decision in *Marbury* v. *Madison*, 1 Cranch 137 in 1803. Cf. *Gibbons* v. *Ogden*, 9 Wheat. 1. The right to vote is too important in our free society to be stripped of judicial protection by such an interpretation of Article I."

This fundamental recognition by the United States Supreme Court is buttressed by its historical recognition in *Wesberry* v. *Sanders,* supra, as that figure who played such a fascinating role in the constitutional history of our nation, a former associate Justice of the Supreme Court, James Wilson, who is quoted at page 17 in the *Wesberry* decision, as follows:

> "All elections ought to be equal. Elections were equal, when a given number of citizens, in one part of the State, choose as many representatives, as are chosen by the same number of citizens in any other part of the State. In this manner, the proportion of the representatives and of the constituents will remain invariably the same."

In *Reynolds* v. *Simms,* 377 U. S. 533, this Court brought to bear the equal protection clause of the Fourteenth Amendment of the United States Constitution and guaranteed to each voter an equal voice in his State government unlike *Wesberry,* which affected Congressional districts. In extending the principle of "one-person one-vote" to State legislative bodies the Court stated:

> As long as ours is a representative form of government and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their State legislature. And if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or ten times the weight of votes of

citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted."

This Court further stated, "Neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population base representation. Citizens not history or economic interests, cast votes." *Reynolds* v. *Sims,* supra, at 579-580.

Commenting further the Court said, "Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographic considerations. Arguments for allowing such deviations in order to assure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing." *Reynolds* v. *Sims,* supra, 580.

This Court next treated the problem of the application of equality of voting rights in the area of units of local government. In *Avery* v. *Midland County,* 390 U. S. 474, this Court extended the principle of equality of voting rights to the local level of government and held in essence that the Constitution does not permit any substantial variation in the degree of representation on the local governmental level.

The Court fully recognized that you do not have different levels of equality for different levels of government and, indeed, that the local level of government is not less important than the Congressional or State Legislature.

"In a word, institutions of legal government have always been a major aspect of our system, and their responsible and responsive operation is today of increasing importance to the quality of life of more and more of our citizens." *Avery* v. *Midland County*, supra, 451.

Most recently this Court in the case of *Hadley* v. *Junior College District of Metropolitan Kansas City, Missouri*, decided February 25, 1970 and unreported, wherein this Court applied the one-man one-vote doctrine and equality requirements of the Fourteenth Amendment to a school district in the State of Missouri, and in so doing stated, "The harm from unequal treatment is the same in any election regardless of the officials selected."

The Court in essence stated that the purpose of the election is not the determining factor in deciding whether voters are entitled to equal voting power, but rather the very fundamental fact that a vote is being taken demands equality of voting representation.

It is clear from the thrust of the cases ruled on by this Court since 1964, that the principle of equality of representation does indeed apply at each and every level of government and is accordingly very much applicable to the people who are the voters of the County of Rockland, and most particularly, all citizens and residents of the County of Rockland whose votes may be deminished in whole or in part as a result of a reapportionment scheme here challenged.

III

The standards of equality as established by the Supreme Court have not been met by the plan of reapportionment of the County of Rockland.

The phrase equal protection under the law, or "one-man one-vote" roll very easily off of the tongue. It is indeed, however, far simpler to say than to develop and devise standards and tests that have meaning and understanding in the complex society in which our nation finds itself a part.

This Court in developing these standards and the need for them, has proceeded judiciously and reasonably, not with an aim to developing a straight-jacket, but with the aim of securing fair and reasonable justice for all of the people.

The Court first enunciated in *Reynolds* v. *Sims*, supra, the concept that the State, or a public agency, or a government, must make a *good faith effort* to achieve precise mathematical equality. Without an effort in good faith to achieve equality of representation then all else would fail. The element of good faith and reasonableness is the thread or the chain that holds together our complex society, and the differences in viewpoints that are expressed in the heterogeneous socity that we live and thrive in.

In the case of *Swann* v. *Adams*, 385 U. S. 440, Mr. Justice White, speaking for the Court stated that

> "We reverse for the failure of the State to present or the District Court to articulate acceptable reasons for the variations among the populations of the various legislative districts, with respect to both the Senate and the House of Representatives. *Reynolds* v. *Sims*, supra, recognized that mathematical

exactness is not required in State apportionment plans. De minimis deviations are unavoidable, but variations of 30% among Senate districts and 40% among House districts can hardly be deemed de minimis and none of our cases suggest that differences of this magnitude will be approved without a satisfactory explanation grounded on acceptable State policy."

We thus see the burden placed upon the proponent of a reapportionment plan to clearly enunciate the basis for any variation from precise mathematical equality.

Let us now turn to the case of *Kirkpatrick* v. *Preiselr*, 394 U. S. 526, wherein this Court elucidated. The as nearly as practicable standard as it related to one-man one-vote.

What are acceptable reasons for variations? A concept that distinct economic and social interests should not be fragmented. This Court in answer to that said, "But to accept population variances, large or small, in order to create districts with specific interest orientations is antithetical to the basic premise of the Constitution command to provide equal representation for equal numbers of people. *Kirkpatrick* v. *Preisler*, supra.

What of the problems of practical politics? The interplay of compromise? The Court stated, "Problems created by partisan politics cannot justify an apportionment which does not otherwise pass constitutional muster." *Kirkpatrick* v. *Preisler*, supra.

The most intriguing standard for justification for variation is the one based upon the maintenance of existing municipal county or other political subdivision boundaries. To this proposal this Court stated, "Similarly, we do not find legally acceptable the argument that variances are justified if they necessarily result from a State's attempt

to avoid fragmenting political subdivisions by drawing Congressional district lines along existing County, municipal, or other political subdivision boundaries. The State's interest in constructing Congressional districts in this manner it is suggested is to minimize the opportunities for partisan gerrymandering. But an argument that deviations from equality are justified in order to inhibit legislators from engaging in partisan gerrymandering is no more than a variant of the argument, already rejected, that considerations of practical politics can justify population disparities." *Kirkpatrick* v. *Preisler*, supra.

The Court similarly dismissed the standard that the districts would be geographically compact based on the fact that it is people that are represented, not geography, and a pleasing-shaped district is not a justification.

The Court did not arbitrarily reject efforts to deal with shifts in population and with the question of the number of eligible voters as distinguished from the actual population, both of these areas were left open as possible basis for variation, yet in the case of the County of Rockland here before this Court, no such justification is claimed, nor can be claimed, since the only basis for the reapportionment plan is to maintain the existing township lines in the County of Rockland despite the fact that the villages throughout the County are divided across town lines. Thus some residents of a village are represented by those representatives from one township while residents of the same village vote for other representatives based solely upon where they live.

We are dealing with a situation of what was a hopelessly malapportioned legislature, unwilling to set its house in order, and seeking to find a justification under a constitutional theory to enable them to maintain their positions of political power without regard to the interest of the people in the County *or* regard to providing

equality of representation. The commission appointed by the Board of Supervisors in this particular case, for the purposes of making recommendations, did indeed initially prepare a recommendation to the County of Rockland for single member districts on an equal basis. This plan was suddenly changed at the eleventh hour for the multi-member plan we now have before us and which is now governing the County of Rockland.

My co-petitioners herein, June Molof et al., on behalf of the League of Women Voters prepared and submitted to the Court of Appeals a map of equal member districts with a variation of 3.5% (see Appendix 1 of this brief for this plan and comment CA49) prepared without regard t[illegible]rtisan political considerations, and shows clearly that [illegible]ed on the most recent census figures of June 1969, that it is indeed possible to provide a reasonably practicable standard of equality and there is no reason within the standards established by this Court that can justify reducing the vote of each and every citizen of the Town of Orangetown by 11.9% when compared with those residents in the adjoining Town of Clarkstown.

This Court in the case of *Wells* v. *Rockefeller,* 394 U. S. 535, dealt with a problem not dissimilar from the problem involved in the County of Rockland. The Wells case evolved upon the establishment of Congressional districts within regions wherein the size of the districts within the region would be fairly close but on a Statewide comparison would have a substantial variation. The variation, interestingly enough, is very close to that found in this case. In the Wells case, a 6.6 variation below the State mean and a 6.5% variation above the State mean amounting to 13.1, whereas in the Rockland County situation we have an 11.9 variation between the highest and the lowest representation.

IV

Multi-member districts and the County of Rockland.

It is not necessary to strike down all multi-member district plans, to reverse the decision in the case at the bar. This Court long ago established in *Fortson* v. *Dorsey*, 379 U. S. 433, that multi-member districts are not violative of the equal protections of the United States Constitution per se. The basic question is does the plan seek to provide substantial equality within the standards set by this Court.

Deutsch v. *Davis*, 387 U. S. 112, does not permit diminshment of any person's vote. Indeed, the election there is based on an at-large election and, therefore, the rights of each voter are given equal treatment and a requirement that the candidates be residents of certain areas which are not necessarily equal in numbers leaves ample room for legitimate political goals of experimentation and creativity without offending the constitutional rights of the voters within the rather secure limits of equality as spelled out in *Kirkpatrick*, *Wells*, *Swann* and *Reynolds*.

What, then, of *Burns* v. *Richardson*, 384 U. S. 73, where this Court in ruling on the apportionment of the State Senate of the State of Hawaii approved multi-member districts with very substantial disparities in population? (See Appendix 2, this Brief). While it is true that the decision in the *Burns* case was made some years before *Kirkpatrick* and *Wells*, it is not necessary to reverse *Burns* in order to correct the inequity existing in the County of Rockland today. First, the apportionment in the *Burns* case was not on the basis of population. It was on the basis of voters per district. We do not know from an examination of the case the population of these

districts. It is interesting to note, however, that the total number of voters is 239,361, while the population of the entire State of Hawaii in 1960, according to the federal census was 632,772. Certainly no assumptions can be made that the population spread was identically in proportion to the spread of voters.

But perhaps the most significant consideration is to be found in the recognition that the State of Hawaii is not a single contiguous land mass nor is it only 178 square miles as is the County of Rockland, but is instead an area of some 6,424 square miles extending over 375 miles of the Pacific Ocean.

In *Swann* v. *Adams,* supra, and *Reynolds* v. *Sims,* supra, it has been stated that variations from a pure population standard might be justified by a State policy, the maintenance of compactness, and/or the recognition of natural or historical boundary lines. It is apparent insofar as the State of Hawaii are concerned that there are very unique natural boundary lines which pose problems is reapportionment unlike those found in any other part of the United States of America. Some basic geographical realities must be taken into consideration.

Appendix 2 lists the Counties of Hawaii, namely, Hawaii, Maui, Honolulu and Kauai. An examination of any Atlas will show the following considerations. Kauai is separated from the nearest island, namely, Oahu, which contains the County of Honolulu by a channel 63 miles wide and 11,232 feet deep.

The Island of Maui is separated from Hawaii by a channel 26 miles wide and 6,192 feet deep, and from the island of Oahu, on which Honolulu is located, by a channel 23 miles wide and 2,244 feet deep. Clearly, these geographical realities of open ocean mandated considerations above and beyond the problems posed in the County of

Rockland, a compact area of 178 square miles, one of the smallest counties in the State of New York, not spread over the open ocean and with easy access in all directions, is totally different than the State of Hawaii.

In view of both the considerations of the geopraphic characteristics of the State of Hawaii, which provides natural boundaries unlike those found in Rockland County and the fact that the apportionment was based on voters per district rather than total population, the case of *Burns* v. *Richardson,* supra, if not in fact reversed by *Kirkpatrick* v. *Preisler* certainly is distinguished.

V

Stare decisis is applicable to the law of this case.

Corpus Juris Secundum, 21 CJS 187, sets forth very clearly the concept and principle of law whereby a principle of law when settled by a series of decisions is binding upon the Courts and should be followed in similar cases. It is a salutary rule entitled to great weight, and ordinarily should be adhered to by the Courts especially where a different ruling would work an injustice to some of the litigants such as in this particular case, where the residents of the Town of Orangetown are underrepresented by almost 12%.

Mr. Justice Harlan has alluded to this basic concept, if not expressly then indirectly when in *Kirkpatrick* v. *Preisler,* supra, wherein he dissented in the following language, "As I do not think that the apportionment plan submitted by the States of New York and Missouri can properly be regarded as offensive to the requirement of equality imposed in *Wesberry*—a case whose constitutional reasoning I still find it impossible to swallow, but by whose dictate I consider myself bound—I dissent."

And again in *Hadley v. Jr. College District of Metropolitan Kansas City,* supra, Mr. Justice Harlan stated, "While I deem myself bound by *Reynolds* and *Avery,* supra,—despite my continued disagreement with them as constitutional holdings."

Certainly the body of law that has been developed in this area mandates nothing less than a careful and considered application of the law as it has been developed by this Court and its even-handed application.

CONCLUSION

It is respectfully requested that,

1. This Court rule the current legislative body to have been elected under an unconstitutional plan of reapportionment.

2. That a special election be mandated at the earliest possible opportunity to enable the people of Rockland County to be fairly and equally represented in their County government.

3. No unconstitutionally constituted body be permitted to participate in drawing any plans of reapportionment for consideration by any Courts in the implementation of a reversal of this case.

Respectfully submitted,

PAUL H. RIVET, ESQ.,
Counsel for Petitioners, Cornelius T. O'Sullivan, Ichabod F. Scott & Michael J. Clarke.

APPENDIX I

Single-Member District Apportionment of Rockland County

Based on Latest Census Data (1969)

Eighteen Districts

Mean Population = 12,159

Range = 11,972 to 12,397

Deviiation from Mean — 1.5% to + 2.0%

Total Spread 3.5%

District No. 1

Stony Point		12,119

District No. 2

Haverstraw	1	4,087
"	2	1,692
"	11	2,557
"	14	1,751
"	4	1,272
"	15	960
"	12	9
		12,328

Appendix I

District No. 3

Haverstraw	13	2,029
"	3	1,425
"	16	1,376
"	6	1,088
"	5	1,007
"	7	665
"	8	1,215
"	9	1,463
"	10	1,085
Clarkstown	2	958
		12,311

District No. 4

Clarkstown	37	1,291
"	53	1,245
"	29	1,327
"	13	1,209
"	46	841
"	25	1,212
"	1	1,338
"	22	853
"	9	1,270
"	40	1,431
		12,017

Appendix I

District No. 5

Clarkstown	52	580
"	14	1,452
"	42	1,234
"	38	1,599
"	7	991
"	43	2,396
"	17	648
"	8	1,059
"	51	737
"	6	267
"	3	1,020
"	6	267
		11,983

District No. 6

Clarkstown	36	1,184
"	48	751
"	27	1,579
"	16	1,004
"	30	1,242
"	19	1,157
"	11	1,775
"	24	795
"	39	1,262
"	32	1,310
		12,059

Appendix I

District No. 7

Clarkstown	26	983
"	31	1,130
"	34	1,207
"	15	886
"	33	1,127
"	35	1,063
"	45	1,023
"	18	972
"	44	655
"	41	472
"	10	1,135
"	21	1,319
		11,972

District No. 8

Clarkstown	47	791
"	12	1,052
"	50	1,269
"	5	1,262
"	28	856
Orangetown	25	961
"	34	1,076
"	29	1,246

Appendix I

District No. 8 (Cont'd)

Orangetown	10	1,237
"	37	577
"	43	1,254
"	24	816
		12,397

District No. 9

Clarkstown	49	992
"	20	673
"	54	688
"	4	572
"	23	774
Orangetown	4	973
"	32	883
"	11	1,372
"	2	946
"	7	834
"	15	382
"	18	933
"	5	1,343
"	8	994
		12,359

Appendix I

District No. 10

Orangetown	40	506
"	3	905
"	41	1,154
"	22	1,504
"	19	803
"	30	988
"	23	1,295
"	44	841
"	28	1,473
"	20	604
"	26	1,250
"	45	680
		12,003

District No. 11

Orangetown	12	1,203
"	13	1,626
"	6	552
"	42	1,488
"	33	1,021
"	1	1,182
"	16	798
"	14	821
"	21	1,300
"	38	975
"	35	1,086
		12,052

Appendix I

District No. 12

Orangetown	#39	1,603
"	36	5,685
"	27	1,833
"	31	1,269
"	9	945
"	17	853
		12,188

District No. 13

Ramapo	15	629
"	39	1,174
"	48	660
"	4	538
"	5	1,047
"	22	1,004
"	37	899
"	59	973
"	33	757
"	56	1,153
"	58	874
"	2	821
"	49	449
"	1	1,170
		12,148

Appendix I

District No. 14

Ramapo	63	1,770
"	42	953
"	10	748
"	47	1,076
"	55	1,318
"	50	1,235
"	52	999
"	38	2,185
"	32	955
"	44	895
		12,134

District No. 15

Ramapo	12	1,509
"	13	1,422
"	21	1,145
"	51	227
"	6	1,852
"	36	3,019
"	23	539
"	27	933
"	64	1,595
		12,241

Appendix I

District No. 16

Ramapo	19	2,072
"	29	1,135
"	53	627
"	8	1,407
"	62	1,779
"	30	1,169
"	26	1,219
"	28	917
"	35	959
"	20	822
		12,106

District No. 17

Ramapo	46	1,549
"	34	1,096
"	3	2,027
"	43	1,438
"	45	749
"	60	647
"	25	1,004
"	40	1,031
"	18	1,304
"	41	1,256
		12,101

Appendix I

District No. 18

Ramapo	16	1,397
"	11	678
"	7	1,826
"	14	976
"	31	1,223
"	61	1,428
"	17	1,417
"	9	1,365
"	57	958
"	24	1,071
		12,339

APPENDIX II

(Burns) *Holt v. Richardson*, 240 F. Supp. 724
DISTRICT APPORTIONMENTS (p. 727)

County	*District*	*No. of Senators*	*Voters per District*	*Representation per Senator*
Hawaii	First	3	28,130	9,377
Maui	Second	2	18,786	9,393
Honolulu	Third	3	27,073	9,024
"	Fourth	4	35,780	8,945
"	Fifth	4	39,361	9,840
"	Sixth	4	40,629	10,157
"	Seventh	4	37,336	9,334
Kauai	Eighth	1	12,266	12,266
	Total	25	239,361	

Norm or Mean (239,361 ÷ 25) 9,574

MAXIMUM VARIATION FROM MEAN

	Kauai
Voters	12,266
Norm	— 9,574

2,692 ÷ 9574 = 28% Mean Variance

PROPORTION OF LARGEST TO SMALLEST DISTRICT

Largest District per whole vote (Eighth)	12,266
Smallest District per whole vote (Fourth)	8,945
Proportion	1.37 to 1

FILE COPY

AUG 13 1970

E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1[redacted] 71

SAMUEL J. ABATE, as a Taxpayer of the County of Rockland, and as a Representative of Others Similarly Situated,

and

JUNE MOLOF, MINDY BAKER, GLORIA ENGLISH, JOYCE BRAZILLER, LINDA BERNS and JUDY BARTOSIK, as Individuals and as Representatives of Others Similarly Situated,

and

CORNELIUS T. O'SULLIVAN, ICHABOD F. SCOTT and MICHAEL J. CLARKE,

Petitioners,

against

PAUL F. MUNDT, PHILIP J. ROTELLA, JOHN B. LOVETT, JOHN F. McALEVEY, HAROLD K. GRUNE, constituting the Board of Supervisors of the County of Rockland, THE COUNTY OF ROCKLAND and CHARLES FURST and MARION DORSEY, as Commissioners of the Board of Elections of the County of Rockland, and THE BOARD OF ELECTIONS OF ROCKLAND COUNTY,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR PETITIONER, SAMUEL J. ABATE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1033

SAMUEL J. ABATE, as a Taxpayer of the County of Rockland, and as a Representative of Others Similarly Situated,

and

JUNE MOLOF, MINDY BAKER, GLORIA ENGLISH, JOYCE BRAZILLER, LINDA BERNS and JUDY BARTOSIK, as Individuals and as Representatives of Others Similarly Situated,

and

CORNELIUS T. O'SULLIVAN, ICHABOD F. SCOTT and MICHAEL J. CLARKE,

Petitioners,

against

PAUL F. MUNDT, PHILIP J. ROTELLA, JOHN B. LOVETT, JOHN F. McALEVEY, HAROLD K. GRUNE, constituting the Board of Supervisors of the County of Rockland, THE COUNTY OF ROCKLAND and CHARLES FURST and MARION DORSEY, as Commissioners of the Board of Elections of the County of Rockland, and THE BOARD OF ELECTIONS OF ROCKLAND COUNTY,

Respondents.

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Opinions Below

The opinion of the Supreme Court of the State of New York at Special Term dated July 21, 1969, and modified on July 30, 1969 is set forth at length in the Appendix hereto, at pages A10 and A19.

The opinion of the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department dated August 26, 1969, and the dissenting opinion, are reported at 33 A. D. 2d 660 and are set forth at length in the Appendix hereto, at pages A24 and A25.

The opinions of the Court of Appeals of the State of New York, dated October 8th, 1969, and the dissenting opinions are reported at 25 N. Y. 2d 309 and are set forth at length in the Appendix hereto, at pages A34 and A42.

Jurisdiction

The order of the Court of Appeals of the State of New York was rendered and entered on October 8th, 1969, a copy of which appears at length in the Appendix hereto, at page A31. The petition for a Writ of Certiorari was filed on January 5, 1970 and was granted on February 24, 1970. The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

Constitutional Provisions Involved

The provision of the United States Constitution involved in the determination of this case is Amendment XIV, Section 1, which states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or en-

force any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented

The questions presented are:

1. Is the multi-member district plan proposed by the Board of Supervisors of Rockland County constitutional?

2. Is the population deviation of 11.9 per cent between the highest and the lowest population per legislator consistent with the rulings of this Court in determining equal representation for equal numbers of people?

3. Has the Board of Supervisors of Rockland County made a good-faith effort to achieve precise mathematical equality as required by the rulings of this Court?

Statement of the Case

Rockland County is located in the New York City Metropolitan Area and is approximately 30 miles from New York City. Until a decade ago it was a small suburban county. In the middle 1950's Rockland County experienced the development of two major arterial highways that became the heartlines of the interstate highway systems in the metropolitan area. Consequently, from that time forward Rockland County experienced rapid, if not phenomenal growth. From its origins, Rockland County was governed by a five man Board of Supervisors, each respective Supervisor being elected by and representing one of the towns comprising the County, without regard to population.

In 1965, an action was commenced by a resident of Rockland County in the New York State Supreme Court for the purposes of compelling the Rockland County Board of Supervisors to reapportion themselves in a manner more consistent with the then recent constitutional guidelines. The Rockland County Board of Supervisors removed that action to the United States District Court for the Southern District of New York. As a result, in May of 1966, the Rockland County Board of Supervisors was directed by the United States District Court for the Southern District of New York to reapportion themselves by submitting a proposed plan to the electorate at the forthcoming general election. That Court mandated that the plan submitted must be consistent with the "one-man, one-vote" doctrine (*Lodico* v. *Board of Supervisors of Rockland County,* 256 F. Supp. 442). The electorate of Rockland County rejected the plan of reapportionment offered.

After several years of minimal activity, and after several attempts to reapportion the County by way of referendum were rejected by the electorate, the instant proceeding was instituted in the New York State Supreme Court. This action sought, *inter alia,* to compel the Rockland County Board of Supervisors to place a plan of reapportionment on the ballot for the general election in November of 1968, since the said Rockland County Board of Supervisors did place for referendum a proposal to establish a County Charter form of Government on the ballot for that November. The Petitioner, Samuel J. Abate, asserted that reapportionment was more important than Charter, and further, that a Charter form of government would be ineffective without reapportionment. The Rockland County Board of Supervisors moved to dismiss that action alleging *res adjudicata,* and claiming

that the decision in the previous Federal action (*Lodico v. Board of Supervisors, supra*) indicated that the United States District Court for the Southern District of New York retained jurisdiction. Mr. Justice Joseph F. Gagliardi, a Justice of the New York State Supreme Court, stayed the State Court action pending clarification and determination as to Federal Court jurisdiction. On March 12, 1969, Mr. Justice Gagliardi issued a supplemental decision vacating the stay and denying the cross-motion. This supplemental decision was rendered in view of correspondence between Judge Croake of the United States District Court for the Southern District of New York and Mr. Justice Gagliardi. Thereafter, the Rockland County Board of Supervisors submitted a plan of weighted voting to the New York State Supreme Court for approval. The weighted voting plan was declared unconstitutional by order of Mr. Justice Hawkins of the New York State Supreme Court and the Board of Supervisors was directed to present the Court with a proposed plan of reapportionment "with all deliberate speed."

Subsequently, and on June 24, 1969, the Board of Supervisors, on recommendation of a reapportionment subcommittee of the Rockland County Charter Commission, adopted a resolution providing for a multi-member district plan of reapportionment, preserving unto the Town Supervisors the automatic right to serve on the County Legislature by reason of their election as a Town Supervisor. This resolution, entitled No. 311 of 1969 (A.1) was submitted to Mr. Justice Hawkins for approval. By decision dated July 21, 1969, and modified July 30, 1969 (A.10 and A.19) the Court implemented a modified form of the proposal presented in the said resolution. Specifically, Mr. Justice Hawkins eliminated the dual capacity

of the Town Supervisors and provided for 18 County Legislators, elected from multi-member districts.

All of the Plaintiffs appealed this decision to the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department. On August 26, 1969, the Appellate Division affirmed the lower court (A.24), the late Honorable George J. Beldock, Presiding Justice of the said Court dissenting (A.25). The late Mr. Justice Beldock in his dissent concerned himself with the recent pronouncements of the United States Supreme Court, and the fact that they have cast considerable doubt "upon the heretofore assumed validity of reapportionment plans which managed to achieve *de minimis* variations but which fell short of exact mathematical equality (A.27)

Mr. Justice Beldock clearly stated that he believed the plan to be unconstitutional, averring that it seemed clear that no attempt had been made to achieve mathematical equality.

This decision was appealed by all of the Plaintiffs to the Court of Appeals of the State of New York, who affirmed the opinion below (A.34). The Honorable Stanley H. Fuld, Chief Justice of the Court of Appeals and the Honorable Matthew J. Jasen, Associate Justice, dissented (A.42). In that dissent, Justices Fuld and Jasen stated that the plan proposed deprives the voters of equal protection of the laws.

All the Plaintiffs petitioned this Court for a Writ of Certiorari on January 5, 1970, which writ was granted by this Honorable Court on February 4, 1970.

Summary of Argument

The Petitioner, Samuel J. Abate, believes that the multi-member district plan of reapportionment as applied to Rockland County is unconstitutional under the "one man, one vote" principle. The existent multi-member district plan, based on the 1969 special census figures results in for a deviation of 11.9% between the highest and lowest population per legislator. Considering population trends in Rockland County, these deviations will continue to increase, and at some point, will far exceed the already substantial deviation figures. The deviation is far in excess of the minimal requirements established by this Court.

The respondent Board of Supervisors, when adopting the apportionment plan in question, allowed criteria other than population to prevail. The precedent is well established to the effect that the controlling criterion must be population, and from this all other considerations may be evaluated and integrated. The desperate attempt of the respondent Board of Supervisors to preserve what they refer to as the "traditional town-county relationship" must not be permitted to supersede constitutional mandates. In Rockland County one man's vote in District No. 5 (Orangetown) is worth 11.9% less than one man's vote in District No. 4 (Clarkstown). If one were to analyze population trends in Rockland County it would soon be evident that the disparity could soon increase.

The plan of reapportionment adopted does not approach the standard established by this Court.

ARGUMENT I

Rockland County's plan of reapportionment is violative of the constitutional requirements for equal representation.

In 1964, this Court declared the basic pronouncement in the area of reapportionment stating that "as nearly as is practicable" one man's vote should be worth as much as another man's vote (*Wesberry* v. *Sanders,* 376 U. S. 1, 1964). This doctrine has been extended by this Court to apply, in addition to Congressional Districts, to State Legislatures (*Reynolds* v. *Sims,* 377 U. S. 533, 1964), units of local Government (*Avery* v. *Midland County,* 390 U. S. 474, 1968), and even to School Districts (*Hadley* v. *The Junior College District of Metropolitan Kansas City, Mo.,* —— U. S. ——, 25 L. Ed. 2d 45, 1970). The The precedent is clear and unambiguous to the effect that "the proportions of the representatives and of the constituents (must) . . . remain invariably the same." (*Wesberry* v. *Sanders, supra* at page 17). This doctrine has been continually expounded and expanded.

Most recently this Honorable Court defined the "as nearly as is practicable" standard. It was held that,

> "Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives. Toleration of even small deviations detracts from these purposes. Therefore, the Command of Article I, §2, that States create . . . districts which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or

for which justification is shown." (*Kirkpatrick* v. *Preisler,* 394 U. S. 526, at page 530, 1969).

In attempting to clarify the position established, this Court further held that,

> ". . . to accept population variances, large or small, in order to create districts with specific interest orientations is antithetical to the basic premise of the Constitutional command to provide equal representation for equal numbers of people. (N)either history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes." (*Reynolds* v. *Sims, supra,* at 579-580).
>
> ". . . The rule is one of 'practicability' rather than political 'practicality' . . . problems created by partisan politics cannot justify an apportionment which does not otherwise pass constitutional muster." (*Kirkpatrick* v. *Preisler, supra*).

In the instant proceeding, the Rockland County Board of Supervisors proposed a plan of reapportionment in which the percentage deviation between the highest population and the lowest population per legislator is 11.9 percent. This deviation far exceeds the minimal requirements established by this Court.

Under the existing plan there is no equality in representation. The Hon. Chief Justice Fuld, of the Court of Appeals, in his dissenting opinion, reduced the respondent Board of Supervisors' motives to their most fundamental element. Justice Fuld stated,

> "In the present case, population was neither 'the starting point' nor 'the controlling criterion.' It is

undisputed and indisputable that the board's sole consideration in fixing legislative districts was the preservation of existing town lines. It was only *after* the districts had been created and its lines fixed that any attempt was made to equalize the voting representation—an attempt which could not possibly succeed because of the nature of the plan." A46)

"Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discrimination based upon factors such as race or economic status." (*Reynolds* v. *Sims, supra* at page 566).

The very foundation of reapportionment is built upon the theory that "[P]opulation is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment . . ." (*Reynolds* v. *Sims, supra* at page 567).

Accordingly, the basic tenet of reapportionment requires adherence to a formula of "as nearly is practicable" population equality. In the case at bar, a disparity of 11.9% is unacceptable, when, with a single member district plan that deviation can be reduced some 8.4%. Under circumstances such as these, the plan adopted cannot be declared to be a bona-fide attempt at reapportionment within constitutional guidelines.

The trends of Rockland County population have proven exceptional growth in certain of the towns of Rockland County, while others have remained fairly constant and without marked change. (See Appendix I.) Between the period of 1966 and 1969 the town based multi-member district numbered 1 (Stony Point) grew some 410 persons while district numbered III (Ramapo) grew some

14,425 persons. Accordingly, in order to achieve some logical and equitable plan of reapportionment in the future, these so called "minimal" population deviations will undoubtedly increase. To permit a multi-member district plan with an 11.9% disparity at this time will lead to greater disparities in the future. The population trends of Rockland County clearly indicate that multi-member districts based upon town boundaries cannot provide the electorate of Rockland County with equal representation under the law. By providing for a multi-member district plan with constant boundaries, a situation has been created whereby it is conceivable that one district could control the entire County Legislature. In point of particular fact, at the present time, District No. 3 controls one-third of the total number of votes that can be cast in the County Legislature. Since that town (District) has experienced the largest population growth and appears to be able, by way of underdeveloped land, to continue this rapid growth, that town (District) can possibly control a majority of the 18 votes on the Legislature. If that town (District) were to elect just one more legislator that town (District) could control the outcome of all votes concerning financial matters by the County Legislature, since twelve votes are required to adopt a financial question. The inherent defects of a multi-member district plan with constant boundaries are infinite.

The Honorable Stanley H. Fuld, Chief Justice of the Court of Appeals, in his dissenting opinion, stated that,

> "In fact, it is theoretically possible for a plan such as the one before us to result in deviations approaching 100%. And, since the plan rigidly fixes district lines—providing for no variation—there is no way to compensate for or minimize such extreme deviations." (A.47).

ARGUMENT II

The Rockland County Board of Supervisors has not made a good faith effort to achieve precise mathematical equality as required by the rulings of this Court.

The Board of Supervisors has maintained that the multi-member district plan proposed and adopted presents the most precise and mathematically equal plan while preserving the "traditional town-county boundary" concept. The 11.9% deviation makes this plan inherently deficient. The town boundary concept cannot stand as the sole basis for reapportionment.

The respondent Board of Supervisors have continually asserted that multi-member districts is the only workable reapportionment plan for Rockland County in order to maintain town lines with a minimal population deviation. It is submitted that the respondent Board of Supervisors have failed to consider any plan other than the one at bar, since this plan preserved for them the so-called traditional relationship. Interestingly enough, the thrust of each of the respondent's appeals throughout the state courts was to preserve unto themselves the ability of a Town Supervisor elect to automatically serve as a County Legislator, without standing for election to that office.

The respondents would have this honorable Court believe that all constitutional guarantees and mandates must be forsaken in order to preserve what they refer to as "the traditional town-county relationship." It is submitted that reapportionment for Rockland County must be held above created political expediencies, which in reality are attempts at self preservation.

The consideration of local convenience should not be deemed so meritorious as to overshadow constitutional guarantees. The late Mr. Justice Beldock; of the Appellate Division of the Supreme Court of the State of New York, in his dissent, clearly brought this issue to the forefront. He stated that,

> "This appeal, therefore, must be dealt with in terms of the justification offered for the variance. We should not content ourselves with the happenstance that the variance in this case is less than in some other case. Notwithstanding the long history of Rockland County's attempts to reapportion, and the particular problems that county faces, I believe that the variance has not been adequately justified. Indeed, defendants' argument on appeal makes little attempt at justification. The thrust of defendants' position on appeal (aside from arguing the abstract acceptability of a multi-member districting plan) is that the variance is *de minimis*. This argument is predicated on language in *Reynolds* and *Swann* cases to the effect that *de minimis* variances will be accepted provided that a rational state policy underlies the basis for the variances. It seems to me, though, that the *Wells* and *Kirkpatrick* cases provide the guidelines for determining rationality. In justification of the variance, the defendants lay stress on the plan's use of existing town lines. This reasoning, however, was rejected by the Court in *Wells* v. *Rockefeller, Supra,* . . .
>
> "In sum, it seems clear that no attempt has been made to achieve a mathematical balance within the standards set forth by the Supreme Court. The plan at bar merely seeks to achieve the best apportionment against the preconceived notion that

the towns must stay intact—a notion which has been rejected by the Supreme Court in its latest pronouncements." (A28, A29, A30)

CONCLUSION

The plan of apportionment proposed and adopted for Rockland County does not meet constitutional "muster". This Honorable Court has consistently held that when an office is to be filled by the electorate, in any level of government, there is no way in which the constitutional requirements of "equality of voting power" can be avoided. (*Hadley* v. *Junior College District of Metropolitan, Kansas City, Missouri, Supra*). These consistent rulings have clearly indicated the manner and methods by which "equality of voting power" can be achieved.

In Rockland County the established criteria were suppressed in order to allow the so-called "traditional town-county relationship" to become an integral part of reapportionment. If this consideration were reduced to its very basic element, it would be obvious that it was simply an attempt at self preservation by the then Supervisors elect. This point comes to sharper focus when one considers that the original plan contained a provision permitting the Town Supervisors elect to serve on the county legislature, *ex officio,* and without standing for election to the county legislature.

The *modus operendi* of the Respondent Board of Supervisors to design a plan preserving unto themselves longevity, while making some attempt at appearing to reapportion upon constitutional guidelines, resulted in an 11.9% deviation between the highest and lowest population per legislator. If this were a plan of reapportionment for a congressional district it would not be deemed

acceptable by this Court. Why, then, should it be acceptable for Rockland County?

This Honorable Court, through a series of pronouncements has held that the same precise standards apply to all units of Government. In the most recent decision this Court stated, that,

> "As we said before, '[v]iable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the constitution to prevent experimentation.' Sailors v. Board of Education, 387 U.S. 105, at page 110-111. But once a state has decided to use the process of popular election and 'once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.' Gray v. Sanders, 372 U.S. 368, at page 381." (Hadley v. the Junior College District of Metropolitan Kansas City, Missouri, Supra, L. Ed. at page 52).

Respectfully submitted,

FRANK P. BARONE
Attorney for Petitioner
Samuel J. Abate

APPENDIX 1

Population Table

Town	*1950*	*1957*	*1960*	*1963*	*1966*	*1969*
Stony Point	5,485	8,132	8,739	10,316	11,704	12,1[illegible]
Haverstraw	12,979	15,073	16,632	17,538	20,659	23,6[illegible]
Orangetown	34,554	39,034	43,172	47,051	49,852	52,0[illegible]
Clarkstown	15,674	24,280	33,196	42,749	51,883	57,8[illegible]
Ramapo	20,584	27,264	35,064	44,375	58,626	73,6[illegible]

JUN 2
JOHN E. DAVIS

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BRIEF FOR RESPONDENTS

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The opinion of the Supreme Court of the State of New York, dated July 21, 1969 and modified on July 30, 1969, is not reported (A. 10 and A. 19).

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The opinion of the Court of Appeals of New York, dated October 8, 1969, and the dissenting opinion are reported at 25 N. Y. 2d 309 (A. 34 and A. 42).

Jurisdiction

The order of the Court of Appeals of New York was made and entered on October 8, 1969 (A. 31). The petition for a writ of certiorari was filed on January 5, 1970 and granted on February 24, 1970. The jurisdiction of this Court is invoked under 28 U. S. C. §1257 (3).

Constitutional Provision and Statute Involved

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Chapter 834 of the Laws of 1969 of the State of New York amended Section 10 of the Municipal Home Rule Law and is set out in part in Appendix A-1 of this brief.

Question Presented

The question presented is whether the plan of reapportionment, which provides for the election of legislators to the legislative body for Rockland County, New York, complies with the equal-population principle enunciated in *Reynolds* v. *Sims,* 377 U. S. 533, and extended to local governments by *Avery* v. *Midland County,* 390 U. S. 474.

Statement of the Case

The County of Rockland is a suburban county in the State of New York located approximately 30 miles north of New York City on the west side of the Hudson River opposite Westchester County. The county includes five towns and thirteen villages. There are no cities in Rockland County. Until the recent apportionment the County was governed by a Board of Supervisors which had both legislative and executive functions. The Board was composed of five supervisors, one being elected from each of the five towns within the County. The supervisor elected in each town served as a member of the County Board of Supervisors by virtue of his election as the executive head of the governing body in the town. The population of each town within the County, as determined by a Federal Census in 1969, was as follows:

Stony Point	12,114
Haverstraw	23,676
Orangetown	52,080
Clarkstown	57,883
Ramapo	73,051
Total	218,804

The population of the County in 1960 was 136,803. The population increase from 1960 to 1969 was 59.9% as determined by the Bureau of the Census. The Rockland County Planning Board has projected that the population in 1985 will be 370,000.

Pursuant to an order of the Supreme Court of the State of New York, the County of Rockland adopted a plan of reapportionment (A. 1) which was approved with some modifications by a judgment of that Court. (See opinions at A. 10 and A. 19.) The plan of reapportionment provided for an 18 member Legislature with all

the powers and duties of a Board of Supervisors. It further provided that the county legislators be elected from five districts within the County. The number of legislators to be allocated to each of the districts was determined by dividing the population of each district by the population of the smallest district. One legislator was allocated to the smallest district and the other legislators were allocated to the remaining districts in accordance with the population of each district. Thus, there were established one single-member district and four multi-member districts. In order to preserve the integrity of the towns and to avoid fragmentation, district and town boundary lines were coterminous. A town supervisor elected within a town as the executive of a town government was permitted to be elected to the County Legislature as a county legislator.

The ideal representation of 12,156 persons per legislator is computed by dividing the total population by the number of legislators. (See Appendix A-2 of this brief.) This figure of ideal representation compared with actual representation shows the extent of over or underrepresentation as follows:

District	Population	Number of Legislators	Population per legislator	% of representation in relation to ideal representation
Stony Point	12,114	1	12,114	0.3% overrepresented
Haverstraw	23,676	2	11,838	2.5% overrepresented
Orangetown	52,080	4	13,020	7.1% underrepresented
Clarkstown	57,883	5	11,577	4.8% overrepresented
Ramapo	73,051	6	12,175	0.2% underrepresented

From this tabulation it appears that Orangetown is underrepresented by 7.1% and Clarkstown is overrepresented by 4.8%, a maximum spread of 11.9%.

This plan of reapportionment was devised in good faith by the Board of Supervisors of Rockland County in compliance with the "one-man, one-vote" rule. This plan also had the desired effect of maintaining the integrity of the towns which had been represented by the town supervisors sitting on the County Board of Supervisors for over a century.

The plan of reapportionment was implemented by a judgment of the Supreme Court (A. 6) and affirmed by the Appellate Division of the Supreme Court (A. 24) and the Court of Appeals (A. 34). County Legislators were elected at the general election in 1969 and took office on January 1, 1970.

Summary of Argument

This case involves the application of the equal-population principle of *Reynolds* v. *Sims*, 377 U. S. 533 and *Avery* v. *Midland County*, 390 U. S. 474, to the plan of reapportionment adopted for the governing body of a local county government in the State of New York. The question is whether a population deviation of 7.1% above and 4.8% below the ideal population per legislator is justified.

Respondents contend that such a deviation is justified by the need to adhere to political subdivision boundaries. The use of town boundaries within Rockland County to establish district lines will maintain a desirable interrelationship between town and county government. The cases of *Kirkpatrick* v. *Preisler*, 394 U. S. 526 and *Wells* v. *Rockefeller*, 394 U. S. 542, are distinguishable because

these cases involved population variances on the Congressional level. The Court in the *Kirkpatrick* and *Wells* cases did not make the principle of equal-population an inflexible test of mathematical exactitude, which would preclude any acceptable justification for population deviations on the local level. It is further shown that the multimember district plan in Rockland County is inherently valid and not susceptible to attack by a mathematical analysis of the representation process. Finally, respondents contend that there are sound public policy considerations which must be weighed in the balance in connection with the application of the equal-population principle to local governments. Local governments, to be effective and responsive to the public, particularly in fast growing suburban and urban areas, must be permitted the flexibility to develop new approaches to present day problems. A tight mathematical formula will inhibit such flexibility.

ARGUMENT

I. Adherence to political subdivision boundaries at the local level is a rational justification for minor population deviations among legislative districts.

The court below held that the population deviations from exact equality in the Rockland County apportionment plan were within permissible limitations. In *Reynolds* v. *Sims,* 377 U. S. 533, 577, this court stated:

> "We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement."

As was said in *Reynolds* v. *Sims,* 377 U. S. 533, 577, the "Equal Protection Clause requires that a state make

a good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." The equal-population principle enunciated in *Reynolds* v. *Sims* was clearly made applicable to the representation function in local government units in *Avery* v. *Midland County,* 390 U. S. 474. However, the *Avery* case did not specify what population deviations at the local level are consistent with the standard of substantial population equality.

It is self-evident that the Equal Protection Clause cannot be held to apply in any less degree to one level of government than to another. A voter's rights must be protected at all levels of representation. It is consistent, however, with the uniform application of the Equal Protection Clause, to permit population deviations justified by a rational state policy (*Swann* v. *Adams,* 385 U. S. 440). In that case the deviations were 30% among Senate districts and 40% among House districts and the court said, at page 444, "De minimis deviations are unavoidable, . . . and none of our cases suggests that differences of this magnitude will be approved without a satisfactory explanation grounded on acceptable state policy."

Similarly in *Kilgarlin* v. *Hill,* 386 U. S. 120, the court relying on *Swann* v. *Adams* held that a variance ratio of 1.31 to 1 in the Texas House of Representatives and a population deviation from the norm of 14.84% overrepresented and 11.64% underrepresented were not minor deviations that would permit retention of established political subdivisions. It was stated (386 U. S. 120, 122) "that unless satisfactorily justified by the court or by the evidence of the record, population variances of the size and significance evident here are sufficient to invalidate an apportionment plan." The rule of equal population has thus been applied to allow minor deviations when justifiable.

This raises the question of whether deviations of 7.1% underrepresented and 4.8% overrepresented in Rockland County are justified within a rational state policy. (For a mathematical analysis of the districts in Rockland County see Appendix A-2 of this brief.) The court below reasoned that the population variation from high to low of 11.9% and the ratio of 1.13 to 1 were justified because there was an adherence to existing political boundary lines of the towns within the county. Since equality is the foundation of the rule of equal-population, it is not enough, in an attempt to justify a variance, to state that there has been adherence to political boundary lines in drawing the districts. We must go beyond this and demonstrate that at the local level the unique interrelationship between town and county governments provides a compelling and rational reason for adhering to town boundaries in the drawing of districts in the State of New York.

Historically in New York, functions of local government have been performed by counties, cities, towns and villages. For several centuries in New York, county government has been governed by a Board of Supervisors which performs legislative and administrative functions. The supervisors are not separately elected as county officers but hold their positions by virtue of their election as supervisors of the towns within the county.[1] Thus the elected executive in each town serves as a member of the County Board of Supervisors. In New York overlapping governmental services are provided by both the town and county governments. Towns have planning and zoning powers, provide for law enforcement,

[1] Section 150 of the County Law of New York (11 McKinney's Consol. Laws) provides, "The supervisors of the several cities and towns in each county, when lawfully convened, shall constitute the board of supervisors of the county."

regulate businesses, maintain roads and highways, provide for sewage and refuse collection and other similar services, and exercise the general police power.[2] The counties in New York, among other things, have historically been responsible for the county jail, the county court system, maintaining county roads, providing protection through the county sheriff, and levying of taxes.[3] In addition, counties are now responsible for providing services in the areas of welfare, health, mental health, sewage collection and treatment, water and air pollution, drainage and refuse collections, and almost every other area of governmental functions. As can be readily seen, there is an overlapping of functions between the town and county governments. In the fiscal area towns adopt their own budgets and submit the amount of money to be raised by taxes to the county government. The county government then levies the tax for both the town and county purposes. The towns then collect the taxes for both the town and the county and remit the county's share of the tax to the County Treasurer. The taxes for both the town and the county are levied based upon the real property assessments that are established by each town separately and then equalized between the towns by the County Board of Supervisors. In addition to this intricate relationship between town and county government in the fiscal area, the services rendered by the two levels of government are also tightly interwoven. The County of Rockland has formulated a large sewer district which has constructed a sewage treatment plant and trunk sewer lines which serve parts of the three largest towns in the county. The towns, on the other hand,

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[2] See, generally, Town Law of New York (61 McKinney's Consol. Laws).

[3] See, generally, County Law of New York (11 McKinney's Consol. Laws).

have constructed lateral sewer lines in the streets which tie into the trunk lines so that there is one integrated system which operates as a result of town and county cooperation. The road system within the county is a crisscross of town and county roads which are separately maintained by each municipality; however, snow removal is provided for through cooperative arrangements between the municipalities.

Turning now to the specific situation in this case, respondents maintain that the need for continuing cooperation between county and town governments in Rockland County has become acute due to the increased demand for services from the public. This demand arises from the population explosion which has occurred as a result of the close proximity of the County to the City of New York. Rockland County is a suburban county which has evidenced a population increase of 59.9% from 1960 to 1969.[4] Since the functions of both town and county government are closely interrelated, it is impossible to meet the demands for services without cooperation between them. The pre-existing Board of Supervisors of the County had such cooperation because the elected executive in the towns served on the County Board of Supervisors. The town governments thus had a direct voice in the performance of county government. The implementation of the equal-population principle on the county level can have the side effect of pulling town and county governments apart and thus polarizing these two levels of government. Under any apportionment scheme, other than a weighted voting plan, the town executive no longer serves on the county legislative body, resulting in a separation of these two levels of government. In order to minimize the impact of this side effect on the operation

[4] Bureau of the Census, Special Census of Rockland County, May 2, 1969.

of government in Rockland County, the plan of reapportionment which was adopted sought to maintain, to the extent possible, the voice of town government in the county legislative body. This was done by permitting the town supervisor to be elected also to the County Legislature from the identical constituency that elected him to the town government. Thus the town government would continue to be directly represented on the county level. This can only be accomplished by establishing districts that adhere to town lines so that the constituency of the county legislator would be the same as the constituency of the town supervisor. In order to maintain the integrity of the towns the Board of Supervisors adopted an apportionment scheme which provided for multimember districts whereby legislators were elected to each district in proportion to the population of the district. In short, the establishment of this plan avoided the necessity of fragmenting the towns which would be required if a single-member district plan were created. The crisis demands that have been imposed on the various levels of government in this suburban county require innovation and farsighted planning to create a structure of government that will be responsive to the needs of the people. These are the practical considerations compelling the County Legislature to develop and support a rational plan of reapportionment with districts that will permit the town governments to have a voice in the operation of county government. To accomplish this, districts were established that maintain the political boundaries of the towns. Any inquiry as to the rational justification for minor population variations at the local level must be made against the backdrop of the Rockland County town-county governmental framework. A sterile mathematical approach to the problems of districting in local government ignores reality.

In New York the State Legislature adopted a policy of maintaining the integrity of political subdivisions by enacting Chapter 834 of the Laws of 1969 (more fully set forth in Appendix A-1 of this brief) amending Section 10 of the Municipal Home Rule Law of New York which provides in part as follows:

> "(a.) A plan of apportionment adopted under this subparagraph shall comply with the following standards, which shall have priority in the order herein set forth, to the extent applicable:
>
> (i.) The plan shall provide substantially equal weight for all the voters of that local government in the allocation of representation in the local legislative body.
>
> (ii.) In such plan adopted by a county, no town except a town having more than one hundred and ten per cent of a full ratio for each representative, shall be divided in the formation of representation areas. Adjacent representation areas in the same town or city shall not contain a greater excess in population than five per cent of a full ratio for each representative.
>
> (iii.) The plan shall provide substantially fair and effective representation for the people of the local government as organized in political parties.
>
> (iv.) Representation areas shall be of convenient and contiguous territory in as compact form as practicable."

This statute reflects the policy of the State of New York to retain the integrity of town political boundaries to the extent possible. The implementation of this policy follows the principle set forth in *Swann* v. *Adams,* 385 U. S. 440,

444, where the court stated that population differences will not be approved without a satisfactory explanation grounded on acceptable state policy. Thus we see that the minor population variances in the apportionment scheme for Rockland County result from districting that is based upon a rational state policy.

The County of Rockland made numerous efforts to establish a plan of reapportionment which would be acceptable to the people. As a result of a directive from the Federal Court in another taxpayer's action (*Lodico* v. *Board of Supervisors of Rockland County*, 256 F. Supp. 442), the Board of Supervisors placed propositions on the ballot for approval of plans of reapportionment at the general election in November of 1966 and at a special election in the spring of 1967. A multimember and a single-member district plan were both rejected by the voters. It is clearly established by the record that the Board of Supervisors of Rockland County acted in good faith and made every reasonable effort to formulate a plan of reapportionment that would be acceptable to the citizens of Rockland County. As a result of the rejection of its reapportionment plans by the voters, the Board of Supervisors sought approval and implementation of a plan by the courts. The good faith of the Board of Supervisors in creating a plan of reapportionment for Rockland County is evidenced by the fact that no other plan can be devised with a smaller population variance unless the boundaries of the towns are to be ignored. A plan adhering to town lines cannot be devised with any less of a population deviation. In *Kilgarlin* v. *Hill*, 386 U. S. 120, the court rejected a state redistricting plan which involved a ratio of the largest to the smallest of 1.31 to 1 taking note of the fact that there were two other plans, proposed upon the very thesis the state asserted, which produced substantially smaller deviations. In the case at bar there is no way that

the population deviations can be minimized unless the policy of following town boundaries is abandoned. The petitioners, June Molof, et al., state in their brief (p. 10) that they presented a single-member district plan which produced a 3.5% deviation. This plan was contained in a map which was not available to the Board of Supervisors or the lower court when the apportionment scheme was prepared and approved, and was seen for the first time when it was presented to the Court of Appeals on oral argument in this case. The good faith of the Board of Supervisors in adopting a multimember district plan cannot be impugned merely by showing that a different type of plan, such as a single-member district plan which does not adhere to political boundaries, can be produced.

Any argument that future population changes within the county may result in a more substantial deviation under the apportionment scheme in Rockland County misses the mark with regard to the scope of inquiry relating to constitutional requirements. All reapportionment plans are vulnerable to population shifts. This applies to single-member as well as multimember districts. We cannot speculate about future population changes but must look only at the existing plan with reference to the latest available census figures. The petitioners have argued that the plan of reapportionment is unconstitutional for the reason that there may be a disproportionate population growth in each of the districts and any new allocation of legislators resulting from this change may create a larger deviation than evidenced by the 1969 census. Reliance has been placed upon the observation of Chief Judge Fuld in the dissenting opinion below on this point (A. 46, A. 47). It is self-evident that under any plan of reapportionment population variances will change with population shifts. The future variances may be larger or they may be smaller. In any case the court cannot speculate about population

changes but must determine the constitutionality of the plan based upon the existing census figures. If district lines must be changed in the future or if alterations in the apportionment scheme are necessary to accommodate population shifts, the legislative body will do what must be done to meet constitutional requirements.

The apportionment scheme in Rockland County does not have any built-in bias favoring one district over another as was present in *Hadley* v. *Junior College District of Metropolitan Kansas City*, — U. S. —, 24 L Ed 2d 45, 52. In fact, the very essence of the problem of future population shifts serves to enforce the proposition that insistence on mathematical exactitude at any one point in time is an ethereal standard.

The record here is free of any allegations of discrimination, whether of a racial or political nature, in the drawing of district lines. The rules established in *Burns* v. *Richardson*, 384 U. S. 73, for the creation of multimember districts have been complied with. The drawing of district lines which adhere to town boundaries has eliminated any possibility of invidious discrimination which would minimize or cancel out the voting strength of racial or political elements of the voting population. The use of pre-established town boundary lines also has the positive effect of preventing the evils of gerrymandering. If existing political boundaries are ignored, the door is then opened to racial and political gerrymandering. Although the use of existing political boundary lines does not foreclose partisan selection of district lines, it does severely limit the possibility of carving out districts which break up racial, ethnic or socio-economic groups which may have a common interest and seek a voice in government. In *Reynolds* v. *Sims*, 377 U. S. 533, 578-579, it was stated that "[i]ndiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more

than an open invitation to partisan gerrymandering." The establishment of districts is inevitably a political process and the ultimate goal should be to provide fair and effective representation to the diverse groups within the community. The application of an abstract mathematical test of equality which compels the drawing of district lines without reference to existing political boundaries invites gerrymandering which can destroy the ability of groups with a common interest to achieve effective representation.[5] The application of a rigid mathematical test can be a godsend to the gerrymanderer. New lines can be drawn to meet any political exigencies. This evil is of paramount concern since not only is it difficult to prove political gerrymandering, it is doubtful that the courts will consider this a justiciable issue over which they will exercise any restraint.

It has been demonstrated that the County of Rockland has established district lines with a minimal population variance justified by the adherence to town lines. If it is argued that such a justification has not been shown here, then one must reach the conclusion that on the local level multimember districts following town lines are unacceptable under any circumstances. The only purpose in creating multimember districts in Rockland County is to permit the retention of the interrelationship between levels of local government within the existing framework. If this is not a legitimate and rational justification for adhering to political boundaries, then it would be indeed difficult to conjure up any circumstances that would permit a population variance. A sterile mathematical approach which precludes any realistic justification for population deviations at the local level ignores the practical complexities that are present in the structural interrelationships of local government. We have shown why the adherence to town boundaries is a rational justification for minor population devia-

[5] See, generally, Dixon, *Democratic Representation: Reapportionment in Law and Politics*, 458 (1968), The Oxford Univ. Press.

tions at the local level. It now remains to demonstrate that circumstances leading to justifications for population deviations may vary at the local level from those on the state and congressional level.

II. This Court's decisions in the *Kirkpatrick* and *Wells* cases do not prohibit justifiable population deviations on the local level.

The decisions of *Kirkpatrick* v. *Preisler,* 394 U. S. 526 and *Wells* v. *Rockefeller,* 394 U. S. 542 involving congressional districts in the States of Missouri and New York are not inconsistent with the decision of the Court of Appeals in this case. In the *Kirkpatrick* case the court rejected a population deviation that ranged from 3.13% above the mathematical ideal to 2.84% below the ideal, or a spread of 5.97%. In the *Wells* case this court disapproved a population deviation that ranged from 6.488% above the state mean to 6.608% below the mean, or a spread of 13.096%. The population deviations in the case now before the court range from 7.1% above the ideal population per legislator to 4.8% below the ideal population per legislator, or a spread of 11.9% as shown in Appendix A-2 of this brief.

In *Reynolds* v. *Sims,* 377 U. S. 533, 577-578, the court recognized that some deviations may be made at different levels of government and stated:

> "In implementing the basic constitutional principle of representative government as enunciated by the Court in Wesberry—equality of population among districts—some distinctions may well be made between congressional and state legislative representation. Since, almost invariably, there is a significantly larger number of seats in state legisla-

tive bodies to be distributed within a State than congressional seats, it may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting while still affording adequate representation to all parts of the State. To do so would be constitutionally valid, so long as the resulting apportionment was one based substantially on population and the equal-population principle was not diluted in any significant way. Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting."

In *Avery* v. *Midland County*, 390 U. S. 474, 484-485, the court, citing the *Reynolds* case in applying the equal-population principle to local governments, said that the "Constitution permits no substantial variation from equal population in drawing districts for units of local government . . ."

The question remains whether the percentage population deviations that were rejected in the *Kirkpatrick* and *Wells* cases establish a tight mathematical test which must be applied on a local level to meet the rule in the *Avery* case requiring no substantial variation. In the *Kirkpatrick* case the court rejected the argument that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and stated at page 530:

"The whole thrust of the 'as nearly as practicable' approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each par-

ticular case. The extent to which equality may practicably be achieved may differ from State to State and from district to district."

It is thus apparent that percentage deviations may vary from one situation to another and the court must look at the facts and circumstances in each case to determine whether they are justified. A careful examination of the facts in the *Kirkpatrick* case makes it clear why the population spread from high to low of 5.97% was not acceptable. The court stated that less accurate data than the census figures had been relied on; that the legislature had rejected a redistricting plan which provided for smaller population variations, and that by the simple device of shifting some counties from one district to another the variances could have been reduced. In short, the court found that the population variances were not unavoidable and that the legislature did not seriously contend that it came as close to equality as it might have come. The state failed to show any acceptable justification for the population variances. The *Kirkpatrick* decision in rejecting a mathematical spread of 5.97% cannot be blindly applied in an attempt to reverse the opinion of the Court below in this case. A comparison, in a vacuum of percentage deviations from one case to another without reference to the facts that may provide an acceptable justification, can only lead to a sterile, absolutist approach which ignores reality.

In the *Wells* case the heart of the congressional districting scheme lay in the decision to treat sections of the State of New York as homogeneous regions and to divide these regions into districts of virtually identical population. It was held that the plan was invalid since the requirement is to equalize population in all districts and not merely between defined regions of the state. The

court discussed the invalidity of the plan in the following terms (394 U. S. 542, 546):

> "New York could not and does not claim that the legislature made a good-faith effort to achieve precise mathematical equality among its 41 congressional districts. Rather, New York tries to justify its scheme of constructing equal districts only within each of seven sub-states as a means to keep regions with distinct interests intact."

Thus the districting plan in New York could not be approved for the reason that the attempted justification for population variances was founded on the false premise that regions of the state can be isolated and equal districts created within the regions. Here again we see that the application of the principle of equal-population requires a careful analysis of the reasons for the scheme of reapportionment and not merely the cold application of a mathematical test. If the court is to impose a standard of near perfection in connection with districting, then it must realistically evaluate the necessity in some cases for legitimate population variances.

There is no question that the Board of Supervisors of Rockland County acted in good faith in devising a plan of reapportionment, and it has been demonstrated that the adherence to town lines is founded on a rational policy of the state. If the court rejects the justification for minor population variances in this case, it will in fact be saying that there is no possible justification for any deviation. If a tight mathematical test is applied, what excuse will there ever be for a percentage deviation of one percent or even one-tenth of one percent? The application of a test of minimal percentage deviations on the local level without any other considerations can produce absurd results. In Rockland County a one percent deviation from the

ideal population per legislator amounts to 121 people. One apartment house in Rockland County may contain several hundred people. Are we to start drawing lines through and around buildings? The maximum deviation is in the Town of Orangetown which is 7.1% underrepresented (see Appendix to this brief, A-2). It is patently unworkable to expect that a map should be drawn without regard to the town boundary, to carve out several apartment houses or several blocks of single family residences for the purpose of excluding 859 people from the district to account for a 7.1% variance. A one percent population deviation in the New York Congressional districts amounts to 4,093 people. It is one thing to draw district lines to pick up 4,093 people and another to shift lines to include only 121 people. These are some of the very practical difficulties that must be observed in comparing the problems of redistricting at the congressional, state and local levels. It is very apparent that a small numerical deviation from a population base will produce a larger percentage of disparity at the local level than at the state or congressional level. The *Kirkpatrick* and *Wells* cases must be viewed within the context of the test laid down in the *Reynolds* case which requires districts "as nearly of equal population as is practicable" (377 U. S. 533, 577). These two more recent cases involving the congressional districts did not undercut the *Reynolds* decision so as to reduce the test of "equality as nearly as practicable" to one where the court will only examine the percentage population deviations without considering other factors.

An absolutist approach to population variances may appear on the surface to be a rule of easy application and one which is judicially manageable. However, on close scrutiny such an approach ignores the complexities that exist on the local level. Any standard that is absolute in its terms will produce an illusory goal of equality

resulting in the search for a plan so equal that no other plan can be devised that is more equal. To apply a strict mathematical test without accepting any valid justification for population variances will stimulate perpetual litigation at the local level and unnecessarily propel the courts into the nightmarish task of drawing district lines.

In the State of New York there are only a few, if any, districting plans that have less of a population variance than is evident in Rockland County.[6] The problems of applying an inflexible test of mathematical exactitude on the local level are overwhelming, and it cannot be concluded from the foregoing analysis of the facts in the *Kirkpatrick* and *Wells* cases that the court intends to impose such a standard at the local level which is intolerant of reality. The Court of Appeals in the decision below wisely applied the principle of equal-population at the local level within the framework of the varying levels of government by stating (A. 37):

> "On this point, it should be recognized that the 'one-man, one-vote' cases have involved at least three levels of legislative reapportionment and that, in dealing with each of these levels, there are quite properly taken into account and weighed in the balance different considerations both as to the permissible variations from strict equality and as to the justification for variations from such strict equality."

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[6] See, generally, in this regard, Information Bulletins #17 and #18, *Reapportionment, Local Government Legislative Bodies*, by Office of Local Government, Albany, N. Y. These bulletins contain information relating to the status of reapportionment in New York State and indicate that as of January 1, 1970, 26 counties will be operating under district plans, 15 under permanent weighted voting plans and 3 under interim weighted voting plans. Of the district plans, eight counties have plans with multimember districts.

This court should permit some population variances so long as they are the result of legitimate circumstances incident to a rational policy based primarily upon population.

III. The Rockland County apportionment plan is inherently valid under the Equal Protection Clause and is not susceptible to attack by a mathematical analysis of the representation process.

In Rockland County the plan of apportionment includes one single-member district and four multimember districts. The use of multimember districts for legislative representation has been approved by this court in *Fortson* v. *Dorsey*, 379 U. S. 433, and *Burns* v. *Richardson*, 384 U. S. 73. Multimember districts were also before this court in *Swann* v. *Adams*, 385 U. S. 440, and *Kilgarlin* v. *Hill*, 386 U. S. 120, although in these two cases the plans of apportionment were rejected as a result of the population variances. In the *Kilgarlin* case (at page 125, n. 3) reference was made to the use of a mathematical analysis of multimember districts by, Banzhaf, *Multi-member Electoral Districts—Do They Violate the "One Man, One Vote" Principle*, 75 Yale L. J. 1309 (1966). This analysis purports to establish that the voters in multimember districts as contrasted with those in single-member districts, have a greater influence on the outcome of the votes within the legislative body.

Although this point has not been raised by the petitioners in their briefs, this court is undoubtedly aware of the writings of commentators who have applied higher mathematics in analyzing apportionment plans.[7] Multimember

[7] Banzhaf, *Multi-member Electoral Districts—Do They Violate the "One Man, One Vote" Principle*, 75 Yale L. J. 1309 (1966); Dixon, *Democratic Representation: Reapportionment in Law and Politics*, 537 (1968), The Oxford Univ. Press; Pennock & Chapman, Editors, *Representation: Nomos X*, 183 (1968), Atherton Press.

districts are established by electing representatives to districts in proportion to the population of each district. If district A has a population of 30,000 and district B has a population of 10,000, it is self-evident that one representative being elected from each district would result in district A being underrepresented. To eliminate this inequality two additional representatives are assigned to district A so that district A has three representatives and district B has one. Another possible method of providing for equality is to divide district A into three separate districts and elect one representative from each new district. In either case the result is the same. A third alternative is to weight the vote of the representative in district A so that he has three votes instead of one. This will not produce equality since the representative from district B, with only one vote, could never cast a critical or deciding vote.

Thus the voting power of the representative in district B under the weighted voting system is zero. This would, in effect, give the voters in district B no effective influence in the legislative body and thus invalidate a plan of weighted voting under these circumstances.

The question at issue here is whether a multimember district plan is acceptable. If the three representatives from multimember district A always voted as a bloc it is clear that they would outvote the one representative from district B. However, bloc voting cannot be assumed in creating any mathematical model. Although legislators may all come from the same district, they will in varying degrees be influenced by party alliances, ethnic blocs, regional differences and interests, and many other factors that are part of the political process. Thus it must be concluded that bloc voting is not a realistic assumption in multimember districts. The voting power of each

representative in the legislative body is the same, unlike the weighted voting example described above. Each representative in the multimember district plan has the same power to cast a deciding or critical vote in the legislative body. It is thus apparent that the deficiencies which are present in a weighted voting system, as described, are not found in a multimember district plan with regard to the voting power of the representatives in the legislative body.

The next step of the analysis requires an examination of the influence or effectiveness of the citizen in a multimember district plan. It has been argued [8] that mathematically the citizens in the multimember districts have an advantage and that the ability of an individual to influence his representative varies as the inverse of the square root of the district population, rather than as the simple inverse of the population of the district. This argument, which has been developed from a mathematical model of the representation process, seeks to prove that the influence of the citizen voter is proportional to the square root of the population of the district. The argument must fail for the reason that the political process of representation in our democracy has too many variables to permit the construction of an abstract mathematical model to test whether or not there is equal voter influence in the constituencies from which legislators are elected.

Furthermore, the propounded arguments relating to multimember districts are founded upon the assumption that the representative is an agent of the constituency and he votes in compliance with the desires of his constituency. This is a gross oversimplification of the func-

[8] Banzhaf, *Multi-member Electoral Districts—Do They Violate the "One Man, One Vote" Principle*, 75 Yale L. J. 1309 (1966); Banzhaf, *One Man, ? Votes: Mathematical Analysis of Voting Power and Effective Representation*, 36 Geo. Wash. Law Rev., 808 (1968).

tion of legislators in our society. It is true that a legislator will consider the wishes of his constituents, but as a practical matter he will vote on issues as they affect the entire area, which is being governed for the good of all. We cannot say, a priori, that a representative does not consider the good of the entire community as opposed to only the wishes of his constituency. Thus the use of mathematical models which are based upon theoretical assumptions about the workings of the political system cannot be accepted by the court in considering the use of multimember districts in Rockland County. Various political factors, including the effect of political parties, make it very difficult, if not impossible, to construct any true mathematical models of the functioning of the representative process in government. The analysis of apportionment plans by the court should not be placed on a sophisticated mathematical level since such an approach will cloud the real goal of apportionment, which is to provide for "fair and effective representation for all citizens" (*Reynolds* v. *Sims*, 377 U. S. 533, 565).

The use of multimember districts in Rockland County will in no way submerge or minimize the interests of any minority groups in the County as was the case in *Chavis* v. *Whitcomb*, 305 F. Supp. 1364 (Pending on Appeal, No. 735, 1198 this term), where the apportionment plan for the Legislature of the State of Indiana was invalidated. The principle established in the *Fortson* and *Burns* cases is that, inherently, multimember district plans are not in violation of the Equal Protection Clause. This same principle applies to the plan of apportionment for Rockland County. Thus the multimember district plan for Rockland County is not susceptible to attack by a mathematical analysis of the representation process.

IV. Sound policy considerations require some flexibility in the application of the equal-population principle to local governments.

The reapportionment revolution has had the desired effect of revitalizing those state governments which were stagnating under the control of rurally dominated legislatures which were unresponsive to the needs of the underrepresented urban and suburban communities. The application of the principle of equal-population, which has brought about the desired result, should not be used in a simplistic manner on the local level so as to stifle needed experimentation in reforming the structure of local governments.

It is apparent throughout this country that the structure of urban and suburban governments is obsolete and incapable of meeting the demands for needed services. Core cities serve the middle class population during the working day but are denied an adequate tax base to meet the demands for public services. Suburban areas are faced with a population explosion of crisis proportions, causing an unmanageable demand for services, which cannot be paid for by taxing real property. One solution is to broaden the tax base to encompass both urban and suburban areas, which will allow for a pooling of resources to combat regional problems such as transportation, sewage and refuse disposal, air pollution, law enforcement and other social needs. In order to resolve some of these regional problems, new and imaginative approaches to the structure of government will be required in the decades ahead. The constitutional requirement of equal-population should not become such a rigid standard that flexible approaches in reaching a detente between urban and suburban areas will become impossible.[9]

---

[9] See, generally, in this regard, *Symposium—One Man-One Vote And Local Government,* 36 Geo. Wash. Law Rev. 741 et seq. (1968).

This court has reflected upon these problems and allowed for such flexibility on the local level in *Dusch* v. *Davis,* 387 U. S. 112. In the *Avery* case (390 U. S. 474) and again in the most recent case of *Hadley* v. *The Junior College District of Metropolitan Kansas City,* —— U. S. ——, 25 L Ed 2d 45, the court referred to the *Dusch* case as illustrative of permissible ways to insure the achievement of legitimate political goals of representation. The *Dusch* case involves the application of the rule of one-man, one-vote to a local government formed as a result of the consolidation of the City of Virginia Beach in Virginia with an adjoining county. Elections at large were upheld even though seven members of an elected eleven man council were required to be residents of districts with varying populations. It appears that the rationale of this decision was to permit reasonable flexibility, which would not foreclose experimentation in forms of representation at the local level. This case is indicative of the court's awareness of the complexities which inevitably will arise between urban and suburban governments within the framework of the political process. In *Sailors* v. *Kent Board of Education,* 387 U. S. 105, at 110-111 it was stated:

> "Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation."

Just as flexibility is required in the application of the equal-population principle to regional forms of government so it must allow representation within the context of the long established town-county government framework. The need for a countywide approach to transportation, sewage disposal, law enforcement and other services

necessitates a viable scheme of interrelationship between the town and county levels of government in Rockland County. If the voice of the towns is submerged and cut off from participation in the operation of county government there will be a regressive movement away from a countywide regional approach to the providing of public services.

The use of multimember districts in Rockland County which conform to existing town government constituencies will permit the towns to play a vital role in the operation of county government. The role of town governments on the county level has been continued in Rockland County since the town supervisor—the elected executive of the town—is permitted to serve simultaneously as the town representative on the county legislative body. Reapportionment on the congressional and state level involves the process of shifting and adjusting district lines to comply with the equal-population principle. However, the application of this principle on the local level to counties in New York has the corollary effect of destroying the traditional structural relationship between town and county governments. Thus, the impact of this constitutional requirement in Rockland County not only affects representation but also alters the entire structure of county government. A decision as to the acceptability of the plan of reapportionment now before this court must be viewed in this context of the structural relationship between the two levels of government.

If local governments cannot restructure, they will stagnate under the crisis demands of the decades ahead and, of necessity, abdicate their responsibilities to the state and federal government. The equal-population principle should not be converted into a standard of absolute mathematical exactitude which will foreclose any flexibility in

the structuring of local governments. Although the application of such a rigid test has an appealing simplicity, it should be recognized that the constitutional goal of fair and effective representation will be achieved if the ultimate constituent power has an opportunity to express itself.

CONCLUSION

The judgment of the Court of Appeals of the State of New York should be affirmed.

Respectfully submitted,

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May 7, 1970

APPENDIX A-1

Chapter 834 of the Laws of 1969 of the State of New York, amending Section 10 of the Municipal Home Rule Law, provides in part as follows:

> Section 1. Statement of legislative intent. The requirement that constituencies of legislators must be substantially equal in population, so as to prevent an impairment of the constitutionally protected right to vote, as lately found and declared by the federal judiciary, imposed upon many local governments the obligation to make confirming adjustments in the structures of their legislative bodies. The judiciary of this state, on the basis of the provisions of the state constitution made a similar finding. The experience of the intervening years has demonstrated that existing law in many cases, does not adequately permit local governments to recast the structures of the legislative bodies in a form which complies with the aforesaid requirements. In particular local governments have been deprived of the freedom to choose various optional forms of legislative structure, have been required to expend large sums of money and encounter considerable delay in obtaining current statistical information, and have been enmeshed in lengthy and unproductive litigation by reason of the referenda requirements imposed by existing law or judicial decree.
>
> It is the purpose of this act to insure (1) that the electorate of local governments shall have the maximum freedom in selecting for themselves a legislative structure which complies with the requirements of law and at the same time meets the needs of each locality; (2) that the exercise of that freedom of

choice shall not be encumbered by requirements that local governments use obsolete information or await costly new statistics; and (3) that meaningful and effective restructuring of local legislative bodies can be accomplished by utilizing referenda which preserve the right of the people to separate submission of the principle elements involved therein. It is recognized that local governments do have some powers of local legislation respecting restructuring of their legislative bodies and this act is intended to extend alternative powers to them. To the extent that local governments already have local legislative powers not subject to referenda requirements, or subject to less restrictive referenda requirements, this act is not intended to and does not impose additional referenda requirements upon them in the exercise of such powers.

1. In addition to powers granted in the constitution the statute of local governments or in any other law, (i) every local government shall have the power to adopt and amend local laws . . . relating to the following subjects . . .

(13) The apportionment of its legislative body and, only in connection with such action taken pursuant to this subparagraph, the composition and membership of such body, the terms of office of members thereof, the units of local government or other areas from which representatives are to be chosen and the voting powers of individual members of such legislative body. The power granted by this subparagraph shall be in addition to and not in substitution for any other power and the provisions of this subparagraph shall apply only to local governments which adopt a plan of apportionment thereunder.

(a.) A plan of apportionment adopted under this subparagraph shall comply with the following standards, which shall have priority in the order herein set forth, to the extent applicable:

(i.) The plan shall provide substantially equal weight for all the voters of that local government in the allocation of representation in the local legislative body.

(ii.) In such plan adopted by a county, no town except a town having more than one hundred and ten per cent of a full ratio for each representative, shall be divided in the formation of representation areas. Adjacent representation areas in the same town or city shall not contain a greater excess in population than five per cent of a full ratio for each representative.

(iii.) The plan shall provide substantially fair and effective representation for the people of the local government as organized in political parties.

(iv.) Representation areas shall be of convenient and contiguous territory in as compact form as practicable.

(b.) A plan of apportionment adopted by a county under this subparagraph may provide that mayors of cities or villages, supervisors of towns or members of the legislative bodies of cities, towns, or villages, who reside in the county shall be eligible to be elected as members of the county legislative body.

(c.) As used in this subparagraph the term "population" shall mean residents, citizens, or registered voters. A population base for such a plan of appor-

tionment shall utilize the latest statistical information obtainable from an official enumeration done at the same time for all the residents, citizens, or registered voters of the local government. Such a plan may allocate, by extrapolation or any other rational method, such latest statistical information to representation areas or units of local government, provided that any plan containing such an allocation shall have annexed thereto as an appendix, a detailed explanation of the allocation.

(d.) Where a public hearing on a local law proposed to be adopted under this subparagraph is required, by subdivision five of section twenty of this chapter, to be held only before an elective chief executive officer, the legislative body shall not adopt such proposed local law until after a public hearing shall have been held thereon before it, on notice as provided in such subdivision five, in which event no public hearing thereon before such chief executive officer shall be required.

(e) A local law proposed to be adopted under this subparagraph shall be subject to referendum only in the manner provided by paragraph j of subdivision two of section twenty-four of this chapter, except that such local law shall be subject to a mandatory referendum in any county in which a provision of law requires a mandatory referendum if a local law proposes a change in the form or composition of the elective governing body of the county. The local law may be so structured as to permit separate submission of the principle elements (such as, multiple office holding as in clause (b) above, the use of multiple member or floterial districts in por-

tions of the local government, and so forth) of the plan and also may provide alternatives in the event one or more of these separate submissions is rejected by the electorate.

(f.) Notwithstanding any inconsistent provisions of any general or special law, or any local law, ordinance, resolution or city or county charter heretofore or hereafter adopted, no local government may restructure its local legislative body (pursuant to provision of this chapter or any other provision of law) more than once in each decade commencing with the year nineteen hundred seventy; provided, however, that this prohibition shall not prevent the periodic adjustment of the weight of the votes of representatives on the basis of current census, voter, or other valid information where an existing plan distributes the votes of representatives on such a basis.

APPENDIX A-2

District	Legislators	Population	Population per legislator
No. 1 Stony Point	1	12,114	12,114
No. 2 Haverstraw	2	23,676	11,838
No. 3 Ramapo	6	73,051	12,175
No. 4 Clarkstown	5	57,883	11,577
No. 5 Orangetown	4	52,080	13,020
	18	218,804	

AVERAGE POPULATION PER LEGISLATOR

(218,804 ÷ 18)=12,156

DEVIATION FROM AVERAGE POPULATION CALCULATED AS FOLLOWS:

District

No. 1 Stony Point
12,156 Population average
—12,114 Population per legislator
42 ÷ 12,156=0.3% overrepresented

No. 2 Haverstraw
12,156 Population average
—11,838 Population per legislator
318 ÷ 12,156=2.5% overrepresented

No. 3 Ramapo
12,175 Population per legislator
—12,156 Population average
19 ÷ 12,156=0.2% underrepresented

No. 4 Clarkstown
12,156 Population average
—11,577 Population per legislator
579 ÷ 12,156=4.8% overrepresented

No. 5 Orangetown
13,020 Population per legislator
—12,156 Population average
864 ÷ 12,156=7.1% underrepresented

PROPORTION OF LARGEST TO SMALLEST POPULATION PER LEGISLATOR

Largest 13,020
Smallest 11,577
Variance (largest divided by smallest) 1.13 to 1

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IN THE

Supreme Court of the United States

October Term, 1969

No. 71

SAMUEL J. ABATE, as a Taxpayer of the County of Rockland, and as a Representative of Others Similarly Situated,

and

JUNE MOLOF, MINDY BAKER, GLORIA ENGLISH, JOYCE BRAZILLER, LINDA BERNS and JUDY BARTOSIK, as Individuals and as Representatives of Others Similarly Situated,

and

CORNELIUS T. O'SULLIVAN, ICHABOD F. SCOTT and MICHAEL J. CLARKE,

Appellants,

against

PAUL F. MUNDT, PHILIP J. ROTELLA, JOHN B. LOVETT, JOHN F. McALEVEY, HAROLD K. GRUNE, constituting the Board of Supervisors of the County of Rockland, THE COUNTY OF ROCKLAND, and CHARLES FURST and MARION DORSEY, as Commissioners of the Board of Elections of the County of Rockland, and THE BOARD OF ELECTIONS OF ROCKLAND COUNTY,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

AMICUS CURIAE BRIEF AND APPENDIX OF THE STATE OF NEW YORK

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IN THE

Supreme Court of the United States

October Term, 1969

No. 1033

SAMUEL J. ABATE, as a Taxpayer of the County of Rockland, and as a Representative of Others Similarly Situated,

and

JUNE MOLOF, MINDY BAKER, GLORIA ENGLISH, JOYCE BRAZILLER, LINDA BERNS and JUDY BARTOSIK, as Individuals and as Representatives of Others Similarly Situated,

and

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Appellants,

against

PAUL F. MUNDT, PHILIP J. ROTELLA, JOHN B. LOVETT, JOHN F. McALEVEY, HAROLD K. GRUNE, constituting the Board of Supervisors of the County of Rockland, THE COUNTY OF ROCKLAND, and CHARLES FURST and MARION DORSEY, as Commissioners of the Board of Elections of the County of Rockland, and THE BOARD OF ELECTIONS OF ROCKLAND COUNTY,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

AMICUS CURIAE BRIEF AND APPENDIX OF THE STATE OF NEW YORK

Statement

The State of New York respectfully requests permission to file this brief *Amicus Curiae*.

The interest of the State of New York is in support of its public policy which allows multi-member districting of municipalities, as such public policy is laid down in the

provisions of the New York State Constitution adopted by a new amendment thereto approved by the People of the State in November, 1963, and enunciated in its judicial decisions and spelled out by statute in 1969. The State of New York is interested in obtaining from this Court a delineation and definition of the breadth or confines of acceptable municipal reapportionment requirements and techniques and thus of workable guidelines thereon so that the mass of reapportionment activity which will materialize following the 1970 Federal Decennial Census may be given direction and municipalities in New York State may be able to adopt plans with reasonable assurance that the result will not be the subject of long litigation.

The position of the parties Respondent has been, and logically can be expected to continue to be, the defense of the individual local law passed by them to reapportion the county. The position of the Appellants is a challenge to the State's public policy.

It thus appears that a presentation of the Statewide position by this brief of the State *amicus curiae* is important to the consideration by the Court of the basic issues in this case, and insofar as the State's concern transcends that of the Respondents which is necessarily confined to their single plan.

Constitutional Provision Involved

The Equal Protection Clause contained in the Fourteenth Amendment to the Constitution of the United States

New York State constitutional provisions and statutes which are involved in this review are set forth in the Appendix hereto.

Questions Presented and Answers of the New York Court of Appeals

1. Are multi-member districting plans constitutional? Answered in the affirmative by the New York Court of Appeals.

2. Is the multi-member districting plan here in question Constitutional?

   Answered in the affirmative by the New York Court of Appeals.

3. Is a reasonable deviation from an approximately exact mathematical equality in numbers of constituents of the members of a municipal elective body elected from multi-member districts, when authorized by local law enacted on a basis of constitutionally required, legislatively enunciated and judicially approved state policy constitutional?

   Answered in the affirmative by the New York Court of Appeals.

4. Is an 11.9 per cent variation between the highest and lowest population per legislator, characterized by Chief Judge Fuld in his dissenting opinion in the New York Court of Appeals (Appellants' Appendix Page 47) as "relatively small", an acceptable percentage variation under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

   Answered in the affirmative by the New York Court of Appeals.

5. Has the Board of Supervisors of Rockland County made a goodfaith effort to achieve equality of representation and was there sufficient justification for any variance from absolute equality?

Answered in the affirmative by the New York Court of Appeals.

6. Are the New York State constitutional provisions and the State's statutory declaration of public policy a violation of the Equal Protection Clause?

Although the question was not answered in specific terms by the New York Court of Appeals, impliedly the answer was in the negative.

The Structure of Municipal Governments in the State of New York outside of New York City[1]

In this *amicus curiae* brief of the State of New York, it is felt that it will be helpful to describe some of the aspects of the structure of New York State municipal law, as they bear upon representation, districting and reapportionment: we do so herein.

The municipal units of government in New York State are Counties, Cities, Towns and Villages.

The Rockland County Board of Supervisors—the governing Board of Counties—originally consisted of supervisors, each of whom had been elected as supervisor of his own town and who, by virtue of such election, became a member of the Board of Supervisors. (Rockland County is made up of five towns and hence there were five members on the Board of Supervisors.)

Each supervisor was elected at large in his town of residence. Each was elected as a town supervisor whose duties were to sit upon and preside over the meetings of the town board (which is the local legislative body of a town) and to act as executive and administrative head of

[1] The city of New York encompasses 5 counties and constitutes an unique unit and is excluded from this discussion.

the town government and as treasurer and disbursing officer for town funds.

The election and the powers and duties of supervisors in the town governments are provided for in the New York Town Law.

The legislative bodies of cities are elected from wards or, in a few cases, elected at large and sometimes by a combination of such methods. These officers are called councilmen or aldermen. Cities (of which there are none in Rockland County) by special charters enacted by the State Legislature and which may be amended by the State Legislature or by Local Law passed by the city also are required to elect one or more supervisors to sit on county boards of supervisors, who originally had certain limited city functions, all or most of which subsequently by local, special or general statute have been transferred elsewhere. In some cities supervisors are all elected at large but in most cities they are elected on a ward basis.

Supervisors, whether of a town or a city, are *ex officio* members of the county board of supervisors. A county board of supervisors is made up entirely of *ex officio* members and no others (9a).[2] In Rockland County, the five town supervisors were *ex officio* members of the Board of Supervisors and the Board of Supervisors consisted solely of its five *ex officio* members. This generalization also is subject to some exceptions. However, *Rock-*

[2] References to Appellants' brief, position and arguments are references to the brief, position and arguments of the Appellants June Molof, *et al.*, as that is the only Appellants' brief received by the Attorney General of the State of New York at the time of the preparation of this brief. Reference to the Respondents herein shall be to the "Board of Supervisors" unless otherwise indicated by the context. References to the annexed appendix are (...a), the "..." to be to the particular page or pages.

land County is a typical small-to-medium sized county in New York State (with the exception that it contains no city) and the general rules in effect in New York State apply to it.

There are 62 counties in New York State and 62 cities. New York City encompasses 5 counties and, as has been noted, is unique. Thus, outside of New York City there are 57 counties and 61 cities. Each city lies wholly within and constitutes but a part of just one county. Each town lies wholly within and constitutes but a part of just one county. No part of a city is in any town and no part of a town is in any city. Counties are made up of any cities which lie within their boundaries, and of towns. All of the State of New York, except for a few enclaves such as ceded territory of the West Point Reservation, consists of counties which in turn consist of cities and towns.

Villages are of a different nature. There are 554 villages in the State of New York. A village may be in one or more towns and counties. 62 villages lie in two towns, and 7 of these villages also lie in two counties. 2 villages lie in 3 towns.

City populations in New York State have representatives on the governing board of the county containing them, and the town populations have representation. Villages, as such, do not, because the populations of the villages receive county representation through the representative of the town in which they live. The village is not a representation unit in county government.

The county board of supervisors is, as has been noted, the local legislative body of the county (2a, 9a, 10a).

History of the adoption of the representation plan under attack

The present Rockland County system of representation was adopted under the authority and pursuant to the requirements of a court decree. The Board of Supervisors was directed by judgment of a court to reapportion the county [*Lodico* v. *Board of Supervisors of Rockland County* [1966], 256 F. Supp. 442].[3] After several attempts to comply with the judgment, which were rejected by the voters at the general election in November, 19[illegible] at a special election in April, 1967, the plan here chall[illegible] was passed by the Board of Supervisors, ~~and was approved by the people of the county at the general election held in November, 1969.~~ This plan with a modification not relevant to this review had been found valid by the New York Supreme Court at Special Term on July 21 and amended July 30, 1969, not officially reported (Appellants' Appendix Pages 10 and 19); the decision was affirmed by the Appellate Division of the Supreme Court, Second Judicial Department, on August 26, 1969, without opinion and with one dissent 33 A.D. 2d 660; ~~the people approved it at a referendum held with the general election in 1969~~; and shortly thereafter, on November 12, the New York Court of Appeals affirmed the determinations of the lower courts 25 N. Y. 2d 309 with a dissent by Chief Judge Fuld, in which Judge Jason joined. The Appellants seek to invalidate this plan.

Chapter 834 of the Laws of 1969 of the State of New York amended the New York State Municipal Home Rule Law by adding a sub-paragraph numbered 13 to paragraph (a) of subdivision 1 of section 10 (16a). The Local Law

[3] It was not done under the authority of Chapter 834 of the Laws of 1969 of the State. This law is discussed *post*.

providing for the system here being challenged referred to the amended State statute. Such reference appears to have been made only for the purpose of pointing out the public policy of the State in relation to municipal reapportionment which allows multi-member districting. The State statute was not necessary to accomplish the reapportionment by Rockland County because it was directed by the Courts. All of the judicially mandated reapportionments of municipalities in New York State were accomplished without statutory authority, it having been implicit that the statutory void was filled by the judgment of the Court.

Summary of Argument

The Constitution and statutes of the State of New York require that representation of the residents in municipalities must be based upon population. They also authorize multi-member districting in municipalities to achieve this end so long as population is used as a criterion in the decision.

The use of multiple-member districts of unequal population has been held by the courts to be a proper tool to use to obtain equal representation of the people of the several districts.

Maintaining town boundaries in creating representation districts is encouraged by the statutes of the State of New York if districting can be accomplished thereby and still provide equal representation to the residents. The Rockland County Board of Supervisors thus had the choice of using multi-member districts, single-member districts of unequal population with its representatives using a weighted vote, or single-member districts from newly created areas of generally equal population. New York

State policy allows the choice by the municipality and the method chosen need not be justified and it need not be shown that neither of the other methods can produce equality of representation.

The "one-man, one-vote" cases have involved at least three levels of legislative reapportionment and, in dealing with each of these levels, there are quite properly taken into account and weighed in the balance different considerations both as to the permissible variations from strict equality and as to the justification for variations from such strict equality.

A weighted voting plan and single-member districting from areas of generally equal populations in counties in New York State, to be acceptable, must provide for only close variations from equality. Multi-member districting plans in counties in New York State, which retain town and city lines to delineate the representation districts, can not be devised to afford quite such precision. However, so long as the system selected by the legislative body to redistrict the county provides satisfactory adherence to the requirement of equal representation, within the genre for achieving equality which has been selected, and in the particular county, the plan should be approved.

The history of rejection by the sophisticated electorate of Rockland County of other reapportionment plans, one of them almost identical to the one urged by the Appellants, devastates the claim of the Appellants that the Board of Supervisors acted in bad faith in adopting the present plan, and the prediction of the Appellants as to a 1980 imbalance in representation is indicated as being a misjudgment from the very facts quoted by the Appellants. No factual basis exists for the conclusion.

All districting plans, whether single or multi-member, or a plan for use of weighted voting, must have static boundaries between re-districtings and the populations of each district will change during this time. *All* possible districting plans would be faulty if the argument of the Appellants based on static boundary lines and variable populations applies.

POINT I

Multi-member district plans are not violative of the Constitution of the United States. The Board of Supervisors had the right to adopt a multi-member district plan and the plan was adopted in good faith.

A

This Court and the New York Court of Appeals have held that multi-member district plans are permissible tools for use to reapportion a municipal representative legislative body to bring it within the ambit of the "one man—one vote" concept. *Fortson* v. *Dorsey* [1965] 379 U. S. 433; *Burnett* v. *Davis* [1965] 382 U. S. 42, affirming 245 F. Supp. 241; *Burns* v. *Richardson* [1966] 384 U. S. 73; and see *Swann* v. *Adams* [1967] 385 U. S. 440. Also, *Michl* v. *Shanklin* [1966] 17 N. Y. 2d 906.

In reliance upon the statements of this Court to the effect that recognition of traditional boundaries is acceptable and that experimentation in the field of government is not abhorrent to the "one man—one vote" rule, the New York Legislature passed and the Governor approved a bill which became Chapter 834 of the Laws of 1969 which added a subparagraph 13 to paragraph (a) of subdivision 1 of Section 10 of the Municipal Home Rule Law (16a). This statute (in clause a, part i) provides that any plan of re-

apportionment of a municipality must provide substantially equal representation for all the voters of that local government; part ii provides that in such plan adopted by a county no town shall be divided in the formation of representation areas if it is possible to avoid division; part iii provides for substantially fair and effective representation of the population. Clause c of the statute defines population to mean residents, citizens or registered voters and requires that a population base for a plan of apportionment shall utilize the latest statistical information available from an official enumeration and that a plan may allocate, by extrapolation or any other *rational* method, such latest statistical information *if properly explained* (18a). This statute authorizes multi-member districts, and, consequently, Rockland County, rightfully relying upon the pronouncements in the field by this Court and the New York Court of Appeals and in reliance upon the declared public policy of the State of New York in its 1969 statute, was entitled to adopt a multi-member districting plan if its legislative body in its wisdom determined that such a plan best met the needs of the county and of the people within it.

It is implied in the brief for Appellants *June Molof, et al.*, that the adoption of this plan by the Board of Supervisors constituted a perverse determination by that Board to have its own way in spite of an overwhelming opinion within the county that the plan was undesirable. The facts belie the implication. The brief itself contains its own refutation. Almost the same plan urged by the Appellants had been adopted once by the Board of Supervisors and rejected by the electors, as had other plans. ~~It certainly~~ is evident that the electors of the ~~county~~ were not about to approve ~~any plan~~ which they did not like just because ~~it had been passed by the Board of Supervisors. The fact~~

~~is, this very sophisticated electorate *did* approve the plan here sought to be invalidated.~~ It would appear, then, that the assertion of these Appellants in their brief as to the reason their plan was defeated does not even constitute a fair inference. It also appears that their typification of overwhelming support for their plan within the county is exaggerated. Conversely, a reasonable conclusion may be drawn that the petitioners with their plan only constitute a vocal and organized minority of the population who wish to impress their will upon the majority. Of course, the will of the majority, if it be a will to be unconstitutionally governed, cannot prevail over the right of the minority to a constitutional form of government (*Lucas* v. *Forty-fourth General Assembly of Colorado* [1964] 377 U. S. 713).

It would seem, however, that here an organized minority is attempting to supersede the judgment of the elected governing body of the community. Even if it be assumed that the Appellants' plan is better than the plan they attack, this has no relevancy as to whether or not the multi-member plan which was adopted is constitutional. Neither does it bear relevancy to the question of good faith of the Board of Supervisors or of the Appellants. The Appellants brief is replete with phrases claiming a lack of "good faith effort to achieve precise mathematical equality" and the complaint is made that there is not precise mathematical equality in the plan. Aside from the point that precise mathematical equality has not only never been required by this court but has specifically been stated to be beyond reasonable anticipation, it would seem that the suppliants, objecting to a failure to achieve precise mathematical equality and trying to interject a substitute plan, should be able to come forward with a plan closer to true parity than one with a 3.5% deviation from precise mathematical equality.

particularly when relying for their whole argument upon *Wells* v. *Rockefeller* [1969] 394 U. S. 535 and *Kirkpatrick* v. *Pressler* [1969] 394 U. S. 526. We suggest that the Appellants are warping *Wells* and *Kirkpatrick* to justify an argument in favor of a particular plan which was a plan no longer acceptable to the legislative body after the electorate of the county rejected it at a referendum, or that at the very least the Board of Supervisors was realistic enough not to try to re-pass the defeated plan and resubmit it at a referendum.

Actually the Board of Supervisors here adopted the only possible plan. It would have been futile to adopt the plan of the Appellants which the electorate had rejected.

There is no basis shown in the record for the Appellants' contention of bad faith, or at least a lack of good faith, on the part of the Board of Supervisors. On the contrary, the record indicates that the Board of Supervisors, in refusing to enact the Appellants' plan, did so only after the Appellants' plan was rejected by the electorate and it was demonstrated that although it has some merit it was unacceptable to the people. Did the Appellants' plan have merit this does not preclude the use of any plan if it, also, has merit. The relative merits between plans are not matters which are subject to court interference.

~~It also follows that the Board of Supervisors showed~~ good judgment and displayed good faith by ~~passing~~ a local law which the electorate ~~approved; an~~ electorate which previously, on two ~~occasions~~, had displayed its discrimination by ~~defeating~~ reapportionment plans not acceptable ~~to it.~~

Statements, such as on Page 8 of the Appellants' brief, that a member of the reapportionment commission resigned

in protest against the majority report and declared that political pressures had been brought to bear are not particularly indicative of anything. Reapportionment—realistically—involves a hope of obtaining political advantage or the satisfaction of realizing the philosophy of one person or group or for some other similar reason, not one of which reasons are inherently bad. Certainly, a disagreement between people or groups of people as to a system to be adopted to supplant a traditional method of government can be expected to produce disagreement, but the real fact of disagreement is no indication of bad faith.

An examination of the record *dehors* conclusory allegations indicates that the Board of Supervisors, after having been directed by the court to reapportion the county, has spent substantial time and effort to do so and has not been adamant in following its own preference but has in succession adopted several plans, all substantially different from one another. This would indicate that the Board of Supervisors has taken a fair-minded approach and has attempted to accomplish its work properly.

As to whether the particular plan adopted does or does not meet the requirements of the "one man—one vote" rule is a matter for the Board of Supervisors to argue. Their right and authority to adopt a multi-member districting plan is a matter in which the State of New York is vitally concerned.

B

The objection of the Appellants to multi-member districts (Point III of their brief) does not withstand scrutiny. Point III announces that a multi-member district plan is unconstitutional "if its district lines are static but its population is subject to change". It can be said with equal lack

of authority that a single member district plan is unconstitutional if its district lines are static but its population is subject to change. Each assertion is equally fallacious. The statement applies to any districting plan. The district lines *must* be static between reapportionments—and the population of any district will not remain the same.

The alternative would be to provide for fluid boundary lines in each district, each of which would have to be adjusted every two or four years before election of officers; in the case of Rockland County, every four years. To accomplish the mechanics of such a constant adjustment is inconceivable, and every adjustment would be subject to litigation.

The elective process in the State of New York commences about April 1st of each year (44a), the time when candidates for nomination to run for public office begin circulating nominating petitions. Within the four-month period between the time of receipt of the 1970 census figures to the time when nominating petitions may be circulated in 1971, reapportionments will have to be prepared by most municipal governments in New York State if litigations to compel them to do so are to be avoided and so that candidates and the electorate can commence the political process. The adjustment would have to be completed no later than about April 1st of the year in which candidates would run for office, an office they would assume on the following January 1st. The population figures to be used for making the boundary adjustments would have to be available in time to allow proper study and the enactment of reapportionment legislation. A conservative estimate as to the latest time at which the population figures would have to be made for this process would be about January 1st of the year of the election. Thus, in fluid boundary dis-

tricts, the figures used as a base for representation would be one year old when the representatives take office and would be outmoded one year after they took office.

The population percentages quoted in Point III of the Appellants' brief prove a conclusion contrary to the one they assert. It is stated that the populations of the districts have changed and that an anticipated continuation of the change establishes invalidity of the present plan. These figures actually show that if this multi-member district plan had been in effect in 1963, there would have been a 27% population variance; if it had been in effect in 1966, there would have been a reduction to a 26% variance; and that there is now a further reduction, in 1969, to 11.9%. The only logical conclusion which can be reached from this series of figures is that the discrepancy in population in these districts of the county is narrowing, not, as the brief asserts, that it is widening. The brief then goes on to quote figures alleged to have been supplied by the local county planning board. The figures do not appear in the record of the case and nowhere is there any explanation as to how they were obtained. They are used to try to show that in 1980 the discrepancy under this plan will be 52%. Any extrapolation, at best, is gossamer and to have any validity must be prepared by experts, supported by facts and figures, trends, experience, and computation and when the result of unexplained extrapolation, projected for a period 10 years hence, reveals a figure belied by precise experience figures of the last 7 years, the predicted result should be accepted by a court only after hearing expert testimony subjected to the most searching cross examination. Here, so far as the record is concerned, the present disparity in representation is apparently narrowing and any contrary claim is rashly conjectural. And, of course, if the same argument used in the Appellants' Point III is

applied to the plan they espouse, the same speculation related to the unproven extrapolation leads to the conclusion that if there were at present a plan providing for single member districts, even of precisely equal population, those districts also would be invalid by the year 1980.

The Appellants' brief also contains the conclusory statement, not supported by any portion of the record, that the Appellants' plan was defeated because it contained no provision for a transitional period.

Without a record, no assertion as to why Plan S was rejected has any validity except the conclusion that the electors disapproved the plan. Lack of a transitional period may or may not have been used as argument in the hurly-burly of a close, local political referendum but there is no way to test the minds of the electors.

All that can be required of a districting plan is that it provide substantial equality of representation for all of the people affected by the plan at the time of its enactment. Then, as the balance of population changes, readjustment will be necessary. It reasonably can be presumed that reapportionment will be required after each decennial census and it is reasonable to decline to require it more frequently in the absence of compelling reasons to the contrary.

POINT II

Municipalities cannot be held to the punctilious attention to percentage deviations which are required of the larger governmental units.

As stated by the New York Court of Appeals in its majority opinion in this case, 25 N. Y. 2d 309, "the 'one man, one

vote' cases have involved at least three levels of legislative reapportionment and that, in dealing with each of these levels, there are quite properly taken into account and weighed in the balance, different considerations both as to the permissible variations from strict equality and as to the justification for variations from such strict equality".

Except in unusual circumstances it can be generalized that: (a) in single member districts of unequal populations if weighted voting is used to achieve equal representation through adjustment of voting weights of the representatives,[4] and in single member districts of reasonably equal populations, with each representative having one vote, only narrow percentages of variation in representation can be allowed in order to satisfy the requirement of equal representation except in unique cases; (b) in multi-member districts using historic subdivisions or natural boundaries a further latitude must of necessity apply. If the latter is not the case it would appear that the approval of multi-member districts by this court must now be reversed.

The population of the State of New York, according to the 1960 federal decennial census, is 16,782,304 persons (45a, 46a). There are 41 congressional districts, 57 State

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[4] A scholarly and extremely accurate article: "An Analysis of Weighted Voting as Used in Reapportionment of County Governments in New York State", by Ronald E. Johnson, published in Volume 34 Albany Law Review Number 1, Fall 1969, at page 1, uses as a point of departure Banzhof, "Weighted Voting Doesn't Work: A Mathematical Analysis", 19 Rutgers Law Review 317, at the point which the New York Court of Appeals approved of the concept of weighted voting in *Iannucci* v. *Washington County* [1967] 20 N. Y. 2d 244, then clearly explains what weighted voting is and how it works, and demonstrates its application in several counties in the State of New York, at the same time pointing out some pit-falls which may result in some representative areas through its use.

senatorial districts and 150 State assembly districts in the State. The mean population per congressional district is 409,324. A small percentage variation from that mean is a tremendous number of people. One percent of the mean is almost the population of one whole New York State county, Hamilton County, which in the 1960 census had a population of 4,267 persons (44a). Major population shifts can be arranged from one congressional district to another just by picking up a boundary line of a Congressional district and moving it so as to include in it one or more additional election districts. These election districts are mapped, geographically defined and easily recognized (40a). Under the New York Election Law (38a) election districts may contain no more than 900 voters. Relatively small percentage variations in populations between these large districts can be managed because such changes constitute great numbers of people. An average size election district would be somewhat less than 900 registered voters multiplied by the times the number of registered voters divides into the total population of the area, roughly by two.

However, when going another step below these State districts and into the municipal level, a very different problem arises and the mechanics of equalizing districts, become, in some instances, insurmountable. The 57 upstate counties of New York State range in population from Hamilton County, having a population of 4,267, to Nassau County, with a population of 1,300,171 persons. Again, Nassau County, as well as Erie County with 1,064,688 persons or Westchester County with 808,891 persons and the other larger counties, do not pose quite the severe mechanical problems of redistricting which are encountered in the small and medium size counties. As an extreme example, let us examine Hamilton County, population 4,267

(44a) and the peculiar problems which exist there. Hamilton County contains 1,090,356 acres or roughly 1,703.7 square miles of area. It is much greater in area than the whole State of Rhode Island which has an area of 1,214 square miles and a 1960 population of 859,488 persons. The State of Rhode Island has a population density of just under 708 people per square mile and just over 1 person per acre. An acre of ground is a building lot slightly larger than 200 feet by 207 feet. Hamilton County, on the other hand, has a population of roughly 2.5 persons per square mile or 1 person per 255 acres. Even more interesting than this is the town populations. There are 9 towns in Hamilton County (44a). The Town of Morehouse consists of 65 people. A shift in counting one of those 65 persons in or out of the Town of Morehouse represents roughly 1.3% of its whole population. The average population per supervisor in Hamilton County is 470 persons. The transfer of just one family unit of average size from one representation area to another, if the county were once divided into nine equally numbered districts, would represent a 1% change in the population of each of two districts. The Town of Arietta in Hamilton County has a population of 235 persons (44a). It is bounded on the east by parts of the Towns of Indian Lake, Lake Pleasant, Wells and Bensen. This eastern boundary is over 50 miles long. The official Highway Department map of Hamilton County shows that the town is crossed by New York Highway No. 8 about 12 miles north of its southern boundary and at the northern end of the town it is crossed by New York Highway No. 365. In all of the rest of that town line the official highway map shows only two pack trails or jeep roads, no county highways or town roads. This is a rather typical boundary line of the towns in that county although it is the longest single boundary line of any of the towns

except for its own west boundary which, because of uneven shape, is difficult to measure. With boundary lines of towns such as that described, it is mechanically impossible to devise representation districts containing substantially equal numbers of people without doing violence to the people themselves by causing them to travel unwarranted distances around mountain ranges and across lakes to vote for candidates with whom they are not acquainted and with whom they have nothing in common. The burden of campaigning poses a similar problem for candidates. A further mechanical problem arises because in small towns the whole town is a single census enumeration district and there is no acceptable manner of subdividing such a district except through an informal head count which has been declared unacceptable (*Seaman* v. *Fedourich* [1965] 16 N. Y. 2d 94). A further consideration also applies to the small counties and that is that the bulk of even the sparse populations is concentrated in hamlets or resort communities.

Hamilton County in New York State is a trackless wilderness and cannot even be termed rural. Perhaps a better way to typify it would be to call it sylvan. This county is not typical in New York State but its huge size and sparse population is typical of substantial portions of several counties in the State and of many counties throughout the nation, all of which will be affected by the decision in this case. The decision in this case should be made only after consideration of all of the people to be affected by it throughout the whole nation.

It cannot be said that Hamilton County is generally similar to Rockland County, around which this case revolves, but the problems pointed out in respect of Hamilton County are present in a medium-sized county such as

Rockland, even though to a lesser degree. Rockland County is mountainous. There are areas with few roads and poor access. There are heavily populated portions and highly urbanized areas. The urbanized areas and the areas of reasonably heavy population can be balanced population-wise with relative ease, but the more sparsely populated sections of the county cannot be.

A local legislative body in New York State has the option to adopt any plan of reapportionment which affords constitutional representation for its constituents and need not justify its reasons for selecting one rather than another (4a, 5a, 16a, 19a, 27a). The test applied is not whether the plan is better than alternative plans, it is whether the plan adopted does or does not afford equal protection of the law. The plan has to meet the test as applied to other plans of the same genre and as applied to the particular subdivision.

While except in unusual circumstances, an 11.9% variation between districts in their representation is unacceptable in a weighted voting plan and in a plan for single member districts of approximately equal population, here, however, we are dealing with a multi-member district plan and the test is different. The test is whether this particular multi-member district plan in this particular county affords satisfactory compliance with the equal protection principle.

Only a realistic approach with an acknowledgment of the almost insurmountable problems which are met in districting areas of relatively small population can be used and this must compel the conclusion that a somewhat less stringent rule is applied to municipalities than to larger segments of government. A good faith effort must be made to achieve a fair and realistic representation balance, but

the percentage variations will inevitably be greater in small than in more populous districts.

It is entirely reasonable for a county board to reapportion the county through the use of multi-member districting, having the districts follow the traditional subdivisions of the county, in this case, the town lines. It is, of course, imperative that such a plan must accord generally equal representation for the people. If generally equal representation is not provided by such a plan, then it is faulty to begin with and population has not been used properly as the primary basis upon which to reapportion. If such a plan does provide generally equal representation then it is established that population has been the basic consideration governing the reapportionment. The dissent in the New York Court of Appeals which would have invalidated the plan here attacked typified the variation as only "relatively small" (Appellants' Appendix p. 47).

It would be a coincidence if exact multiples of population would ever result when creating multi-member districts for selection of representatives. This Court must have realized this when deciding (*Fortson* v. *Dorsey* [1965] 379 U. S. 433; *Burnett* v. *Davis* [1965] 382 U. S. 42, affirming 245 F. Supp. 241; *Burns* v. *Richardson* [1966] 384 U. S. 73; and see, *Swann* v. *Adams* [1967] 385 U. S. 440.

The State of New York is concerned that its municipalities continue to have freedom of choice, under their home rule power, to adopt any apportionment plan which does meet, within that municipality, the standards of equal protection of the law.

CONCLUSION

The districting plan of the respondents which uses multi-member districting to achieve equal representation for the residents of Rockland County should be upheld.

Dated: June 8, 1970.

Respectfully submitted,

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New York State Constitution

ARTICLE I

Bill of Rights

[*Rights, privileges and franchise secured; power of legislature to dispense with primary elections in certain cases.*] Section 1. No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers, except that the legislature may provide that there shall be no primary election held to nominate candidates for public office or to elect persons to party positions for any political party or parties in any unit of representation of the state from which such candidates or persons are nominated or elected whenever there is no contest or contests for such nominations or election as may be prescribed by general law. (Amended by vote of the people November 3, 1959.)

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[*Equal protection of law; discrimination in civil rights prohibited.*] § 11. No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state. (New. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

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New York State Constitution.

*ARTICLE IX

Local Governments

Bill of rights for local governments.

Section 1. Effective local self-government and intergovernmental cooperation are purposes of the people of the state. In furtherance thereof, local governments shall have the following rights, powers, privileges and immunities in addition to those granted by other provisions of this constitution:

(a) Every local government, except a county wholly included within a city, shall have a legislative body elective by the people thereof. Every local government shall have power to adopt local laws as provided by this article.

(b) All officers of every local government whose election or appointment is not provided for by this constitution shall be elected by the people of the local government, or of some division thereof, or appointed by such officers of the local government as may be provided by law.

(c) Local governments shall have power to agree, as authorized by act of the legislature, with the federal government, a state or one or more other governments within or without the state, to provide cooperatively, jointly or by contract any facility, service, activity or undertaking which each participating local government has the power

* New article adopted by amendment approved by the vote of the people November 5, 1963. Former Article IX repealed, except for sections, 5, 6 and 8 which were renumbered subdivisions (a), (b) and (c) respectively of new section 13 of Article XIII.

to provide separately. Each such local government shall have power to apportion its share of the cost thereof upon such portion of its area as may be authorized by act of the legislature.

(d) No local government or any part of the territory thereof shall be annexed to another until the people, if any, of the territory proposed to be annexed shall have consented thereto by majority vote on a referendum and until the governing board of each local government, the area of which is affected, shall have consented thereto upon the basis of a determination that the annexation is in the over-all public interest. The consent of the governing board of a county shall be required only where a boundary of the county is affected. On or before July first, nineteen hundred sixty-four, the legislature shall provide, where such consent of a governing board is not granted, for adjudication and determination, on the law and the facts, in a proceeding initiated in the supreme court, of the issue of whether the annexation is in the over-all public interest.

(e) Local governments shall have power to take by eminent domain private property within their boundaries for public use together with excess land or property but no more than is sufficient to provide for appropriate disposition or use of land or property which abuts on that necessary for such public use, and to sell or lease that not devoted to such use. The legislature may authorize and regulate the exercise of the power of eminent domain and excess condemnation by a local government outside its boundaries.

(f) No local government shall be prohibited by the legislature (1) from making a fair return on the value

of the property used and useful in its operation of a gas, electric or water public utility service, over and above costs of operation and maintenance and necessary and proper reserves, in addition to an amount equivalent to taxes which such service, if privately owned, would pay to such local government, or (2) from using such profits for payment of refunds to consumers or for any other lawful purpose.

(g) A local government shall have power to apportion its cost of a governmental service or function upon any portion of its area, as authorized by act of the legislature.

(h) (1) Counties, other than those wholly included within a city, shall be empowered by general law, or by special law enacted upon county request pursuant to section two of this article, to adopt, amend or repeal alternative forms of county government provided by the legislature or to prepare, adopt, amend or repeal alternative forms of their own. Any such form of government or any amendment thereof, by act of the legislature or by local law, may transfer one or more functions or duties of the county or of the cities, towns, villages, districts or other units of government wholly contained in such county to each other or when authorized by the legislature to the state, or may abolish one or more offices, departments, agencies or units of government provided, however, that no such form or amendment, except as provided in paragraph (2) of this subdivision, shall become effective unless approved on a referendum by a majority of the votes cast thereon in the area of the county outside of cities, and in the cities of the county, if any, considered as one unit. Where an alternative form of county government or any amendment

thereof, by act of the legislature or by local law, provides for the transfer of any function or duty to or from any village or the abolition of any office, department, agency or unit of government of a village wholly contained in such county, such form or amendment shall not become effective unless it shall also be approved on the referendum by a majority of the votes cast thereon in all the villages so affected considered as one unit.

(2) After the adoption of an alternative form of county government by a county, any amendment thereof by act of the legislature or by local law which abolishes or creates an elective county office, changes the voting or veto power of or the method of removing an elective county officer during his term of office, abolishes, curtails or transfers to another county officer or agency any power of an elective county officer or changes the form or composition of the county legislative body shall be subject to a permissive referendum as provided by the legislature.

POWERS AND DUTIES OF LEGISLATURE; HOME RULE POWERS OF LOCAL GOVERNMENTS; STATUTE OF LOCAL GOVERNMENTS.

§ 2. (a) The legislature shall provide for the creation and organization of local governments in such manner as shall secure to them the rights, powers, privileges and immunities granted to them by this constitution.

(b) Subject to the bill of rights of local governments and other applicable provisions of this constitution, the legislature:

(1) Shall enact, and may from time to time amend, a statute of local governments granting to local govern-

ments powers including but not limited to those of local legislation and administration in addition to the powers vested in them by this article. A power granted in such statute may be repealed, diminished, impaired or suspended only by enactment of a statute by the legislature with the approval of the governor at its regular session in one calendar year and the re-enactment and approval of such statute in the following calendar year.

(2) Shall have the power to act in relation to the property, affairs or government of any local government only by general law, or by special law only (a) on request of two-thirds of the total membership of its legislative body or on request of its chief executive officer concurred in by a majority of such membership, or (b) except in the case of the city of New York, on certificate of necessity from the governor reciting facts which in his judgment constitute an emergency requiring enactment of such law and, in such latter case, with the concurrence of two-thirds of the members elected to each house of the legislature.

(3) Shall have the power to confer on local governments powers not relating to their property, affairs or government including but not limited to those of local legislation and administration, in addition to those otherwise granted by or pursuant to this article, and to withdraw or restrict such additional powers.

(c) In addition to powers granted in the statute of local governments or any other law, (i) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government and, (ii) every local government shall have power

to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or government of such local government:

(1) The powers, duties, qualifications, number, mode of selection and removal, terms of office, compensation, hours of work, protection, welfare and safety of its officers and employees, except that cities and towns shall not have such power with respect to members of the legislative body of the county in their capacities as county officers.

(2) In the case of a city, town or village, the membership and composition of its legislative body.

(3) The transaction of its business.

(4) The incurring of its obligations, except that local laws relating to financing by the issuance of evidences of indebtedness by such local government shall be consistent with laws enacted by the legislature.

(5) The presentation, ascertainment and discharge of claims against it.

(6) The acquisition, care, management and use of its highway, roads, streets, avenues and property.

(7) The acquisition of its transit facilities and the ownership and operation thereof.

(8) The levy, collection and administration of local taxes authorized by the legislature and of assessments for

local improvements, consistent with laws enacted by the legislature.

(9) The wages or salaries, the hours of work or labor, and the protection, welfare and safety of persons employed by any contractor or sub-contractor performing work, labor or services for it.

(10) The government, protection, order, conduct, safety, health and well-being of persons or property therein.

(d) Except in the case of a transfer of functions under an alternative form of county government, a local government shall not have power to adopt local laws which impair the powers of any other local government.

(e) The rights and powers of local governments specified in this section insofar as applicable to any county within the city of New York shall be vested in such city.

EXISTING LAWS TO REMAIN APPLICABLE; CONSTRUCTION; DEFINITIONS.

§ 3. (a) Except as expressly provided, nothing in this article shall restrict or impair any power of the legislature in relation to:

(1) The maintenance, support or administration of the public school system, as required or provided by article XI of this constitution, or any retirement system pertaining to such public school system.

(2) The courts as required or provided by article VI of this constitution, and

(3) Matters other than the property, affairs or government of a local government.

New York State County Law.

(b) The provisions of this article shall not affect any existing valid provisions of acts of the legislature or of local legislation and such provisions shall continue in force until repealed, amended, modified or superseded in accordance with the provisions of this constitution.

(c) Rights, powers, privileges and immunities granted to local governments by this article shall be liberally construed.

(d) Whenever used in this article the following terms shall mean or include:

(1) "General law." A law which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages.

(2) "Local government." A county, city, town or village.

(3) "People." Persons entitled to vote as provided in section one of article two of this constitution.

(4) "Special law." A law which in terms and in effect applies to one or more, but not all, counties, counties other than those wholly included within a city, cities, towns or villages.

New York State County Law

§ 150. BOARD OF SUPERVISORS CONSTITUTED

The supervisors of the several cities and town in each county, when lawfully convened, shall constitute the board of supervisors of the county.

New York State County Law.

§ 150-a. COUNTY LEGISLATIVE BODY, OTHER THAN BOARD OF SUPERVISORS

1. All the functions, powers, obligations and duties which by law are possessed by or vested in the board of supervisors of a county may be exercised by an elected county legislative body, by whatsoever name designated, which shall, pursuant to law, or order or judgment of a court of competent jurisdiction, be established in place of the board of supervisors of such county. All acts heretofore performed by such elected county legislative body shall be valid if and to the extent that they would have been valid if performed by the board of supervisors of such county.

2. Whenever the board of supervisors of a county is referred to or designated in any law, contract or document pertaining to any of the functions, powers, obligations and duties of such board, such reference or designation shall be deemed to include the elected county legislative body, by whatsoever name designated which, pursuant to law, or order or judgement of a court of competent jurisdiction, shall have been established in place of the board of supervisors.

Added L.1968, c. 1070, § 1, eff. June 22, 1968.

§ 153. RULES OF PROCEDURE

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4. Whenever in this chapter or other general, special or local law, the board of supervisors is authorized or required to act, and no proportion of the voting strength for

such action is otherwise prescribed, such action shall be taken by the affirmative vote of a majority of the total membership of the board. A roll call shall be taken and entered by the clerk in the minutes of its proceedings when required by law or upon request of any member of the board.

New York State Municipal Home Rule Law

ARTICLE 1—SHORT TITLE; DEFINITIONS

Sec.

1. Short title.

2. Definitions.

§ 1. SHORT TITLE

This chapter shall be known, cited and referred to as the "municipal home rule law."

§ 2. DEFINITIONS

As used in this chapter the following terms shall mean or include:

1. "Charter." A state statute or a local law which establishes or continues a specific county, city or village as a municipal corporation or body politic and includes the

fundamental provisions defining, extending or limiting its corporate powers or affecting the framework of its government.

2. "Charter amendment." A new charter or any change in an existing charter presented as such under authority of this chapter or any state statute or charter. A charter amendment may be of any extent and may deal with any number of subjects.

3. "Clerk." The clerk of the board of supervisors of a county, the clerk of a city, town or village or, if there be no officer so designated, an officer exercising corresponding duties.

4. "Elective chief executive officer." The chief executive officer of a county elected on a county-wide basis or if there be none the chairman of the board of supervisors, the mayor of a city or village or the supervisor of a town, where such officer is vested with power to approve or veto local laws or ordinances.

5. "General law." A state statute which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages.

6. "Law." A state statute, charter or local law.

7. "Legislative body." The board of supervisors, board of aldermen, common council, council, commission, town board, board of trustees or other elective governing board or body now or hereafter vested by state statute, charter or other law with jurisdiction to initiate and adopt local

laws or ordinances, whether or not such local laws or ordinances require the approval of the elective chief executive officer or other official or body to become effective.

8. "Local government." A county, city, town or village.

9. "Local law." A law (a) adopted pursuant to this chapter or to other authorization of a state statute or charter by the legislative body of a local government, or (b) proposed by a charter commission or by petition, and ratified by popular vote, as provided in article four of this chapter or as provided in a state statute, charter or local law; but shall not mean or include an ordinance, resolution or other similar act of the legislative body or of any other board or body.

10. "New charter." A charter which supersedes or repeals an existing charter in its entirety or in the manner provided in subdivision four or subdivision five of section thirty-six of this chapter.

11. "Public corporation." A municipal corporation, a district corporation or a public benefit corporation as defined in section three of the general corporation law.

12. "Special law." A state statute which in terms and in effect applies to one or more, but not all, counties, counties other than those wholly included within a city, cities, towns or villages. As amended L. 1964, c. 78, § 1, eff. March 2, 1964, retroactive to Jan. 1, 1964.

New York State Municipal Home Rule Law.

ARTICLE 2—GENERAL POWERS OF LOCAL GOVERNMENTS TO ADOPT AND AMEND LOCAL LAWS; RESTRICTIONS

Sec.

10. General powers of local governments to adopt and amend local laws.

11. Restrictions on the adoption of local laws.

§ 10. General powers of local governments to adopt and amend local laws

1. In addition to powers granted in the constitution, the statute of local governments or in any other law,

(i) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law relating to its property, affairs or government and,

(ii) every local government, as provided in this chapter, shall have power to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law, relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or government of such local government:

a. A county, city, town or village:

(1) The powers, duties, qualifications, number, mode of selection and removal, terms of office, compensation, hours

of work, protection, welfare and safety of its officers and employees, except that cities and towns shall not have such power with respect to members of the legislative body of the county in their capacities as county officers. This provision shall include but not be limited to the creation or discontinuance of departments of its government and the prescription or modification of their powers and duties.

(2) In the case of a city, town or village, the membership and composition of its legislative body.

(3) The transaction of its business.

(4) The incurring of its obligations, except that local laws relating to financing by the issuance of evidences of indebtedness by such local government shall be consistent with laws enacted by the legislature.

(5) The presentation, ascertainment, disposition and discharge of claims against it.

(6) The acquisition, care, management and use of its highways, roads, streets, avenues and property.

(7) The acquisition of its transit facilities and the ownership and operation thereof.

(8) The levy and administration of local taxes authorized by the legislature and of assessments for local improvements, which in the case of county, town or village local laws relating to local non-property taxes shall be consistent with laws enacted by the legislature.

(9) The collection of local taxes authorized by the legislature and of assessments for local improvements, which in the case of county, town or village local laws shall be consistent with laws enacted by the legislature.

New York State Municipal Home Rule Law.

(9-a) The fixing, levy, collection and administration of local government rentals, charges, rates or fees, penalties and rates of interest thereon, liens on local property in connection therewith and charges thereon.

(10) The wages or salaries, the hours of work or labor, and the protection, welfare and safety of persons employed by any contractor or subcontractor performing work, labor or services for it.

(11) The government, protection, order, conduct, safety, health and well-being of persons or property therein. This provision shall include but not be limited to the power to adopt local laws providing for the regulation or licensing of occupations or businesses provided, however, that:

(a) The exercise of such power by a town shall relate only to the area thereof outside the village or villages therein.

(b) Except in a case where and to the extent that a county is specifically authorized to regulate or license an occupation or business, the exercise of such power by a county shall relate only to the area thereof outside any city, village or area of any town outside the village or villages therein during such time as such city, village or town is regulating or licensing the occupation or business in question.

(12) The powers granted to it in the statute of local governments.

(13) The apportionment of its legislative body and, only in connection with such action taken pursuant to this subparagraph, the composition and membership of such

body, the terms of office of members thereof, the units of local government or other areas from which representatives are to be chosen and the voting powers of individual members of such legislative body. The power granted by this subparagraph shall be in addition to and not in substitution for any other power and the provisions of this subparagraph shall apply only to local governments which adopt a plan of apportionment thereunder.

(a.) A plan of apportionment adopted under this subparagraph shall comply with the following standards, which shall have priority in the order herein set forth, to the extent applicable:

(i.) The plan shall provide substantially equal weight for all the voters of that local government in the allocation of representation in the local legislative body.

(ii.) In such plan adopted by a county, no town except a town having more than one hundred and ten per cent of a full ratio for each representative, shall be divided in the formation of representation areas. Adjacent representation areas in the same town or city shall not contain a greater excess in population than five per cent of a full ratio for each representative.

(iii.) The plan shall provide substantially fair and effective representation for the people of the local government as organized in political parties.

(iv.) Representation areas shall be of convenient and contiguous territory in as compact form as practicable.

(b.) A plan of apportionment adopted by a county under this subparagraph may provide that mayors of cities

or villages, supervisors of towns or members of the legislative bodies of cities, towns, or villages, who reside in the county shall be eligible to be elected as members of the county legislative body.

(c.) As used in this subparagraph the term "population" shall mean residents, citizens, or registered voters. A population base for such a plan of apportionment shall utilize the latest statistical information obtainable from an official enumeration done at the same time for all the residents, citizens, or registered voters of the local government. Such a plan may allocate, by extrapolation or any other rational method, such latest statistical information to representation areas or units of local government, provided that any plan containing such an allocation shall have annexed thereto as an appendix, a detailed explanation of the allocation.

(d.) Where a public hearing on a local law proposed to be adopted under this subparagraph is required, by subdivision five of section twenty of this chapter, to be held only before an elective chief executive officer, the legislative body shall not adopt such proposed local law until after a public hearing shall have been held thereon before it, on notice as provided in such subdivision five, in which event no public hearing thereon before such chief executive officer shall be required.

(e) a local law proposed to be adopted under this subparagraph shall be subject to referendum only in the manner provided by paragraph j of subdivision two of section twenty-four of this chapter, except that such local law shall be subject to a mandatory referendum in any county in which a provision of law requires a mandatory referendum

if a local law proposes a change in the form or composition of the elective governing body of the county. The local law may be so structured as to permit separate submission of the principle elements (such as, multiple office holding as in clause (b) above, the use of multiple member or floterial districts in portions of the local government, and so forth) of the plan and also may provide alternatives in the event one or more of these separate submissions is rejected by the electorate.

(f.) Notwithstanding any inconsistent provisions of any general or special law, or any local law, ordinance, resolution or city or county charter heretofore or hereafter adopted, no local government may restructure its local legislative body (pursuant to provision of this chapter or any other provision of law) more than once in each decade commencing with the year nineteen hundred seventy; provided, however, that this prohibition shall not prevent the periodic adjustment of the weight of the votes of representatives on the basis of current census, voter, or other valid information where an existing plan distributes the votes of representatives on such a basis.

b. A county:

(1) The adoption, amendment or repeal of a county charter pursuant to article four of this chapter in addition to its powers under this article.

(2) The establishment of a county tax department headed by a director appointed by and serving at the pleasure of the board of supervisors, which director shall, subject to authorization of such board (a) employ necessary employees, (b) advise with and assist all assessors,

collectors and receivers of taxes of the various tax districts within the county in the discharge of their duties, (c) assist in the preparation of equalization rates with the various tax districts within the county, (d) assist in the disposition and sale of real property acquired by the county as the result of enforcement of unpaid taxes, and (e) perform such other duties as shall be prescribed by such board.

(3) The assignment to and the performance by the chairman of the board of supervisors of specified administrative functions, powers and duties on behalf of such board, with provision for periodic reports to such board, and with further provision that such local law shall not divest board of such functions, powers and duties.

(4) The creation of an office of administrative assistant to the chairman of the board of supervisors and assignment to and performance by such an assistant, under the general supervision of such chairman, of specified administrative functions, powers and duties on behalf of such board, with provision for periodic reports to such board, and with further provision that such local law shall not divest such board of such functions, powers and duties.

(5) The compensation to be paid from county funds to public officers or employees who are not officers or employees of the county other than members of the judiciary.

(6) The method for the correction of manifest clerical or other errors or omissions in assessment rolls or returns thereof as authorized by sections five hundred fifty-four and five hundred fifty-six of the real property tax law, subject to review by the courts as provided by law.

(7) The protection or preservation of game, game birds, fish or shell fish on county-owned lands.

(8) The control of floods or the conservation of soil.

(9) The reforestation of lands owned by the county.

(10) The eradication or prevention of bovine tuberculosis or other infectious or communicable diseases affecting animals or fowls.

(11) The regulation or prohibition of the dumping of garbage, rubbish, ashes or other waste material in or adjacent to creeks or streams in watershed areas improved under any flood control or soil erosion program.

c. A city:

(1) The revision of its charter or the adoption of a new charter by local law adopted by its legislative body pursuant to the provisions of this chapter and subject to the procedure prescribed by this chapter or by local law adopted pursuant to article four of this chapter.

(2) The preparation, making, confirmation and correction of assessments of real property and the review of such assessments subject to further review by the courts as provided by law.

(3) The authorization, making, confirmation and correction of benefit assessments for local improvements.

d. A town:

(1) The preparation, making, confirmation and correction of assessments of real property and the review of such assessments subject to further review by the courts as provided by law, consistent with laws enacted by the legislature.

(2) The authorization, making, confirmation and correction of benefit assessments for local improvements, consistent with laws enacted by the legislature.

e. A village:

(1) The preparation, making, confirmation and correction of assessments of real property and the review of such assessments subject to further review by the courts as provided by law, consistent with laws enacted by the legislature.

(2) The authorization, making confirmation and correction of benefit assessments for local improvements.

(3) The amendment or supersession in its application to it, of any provision of the village law relating to the property, affairs or government of the village or to other matters in relation to which and to the extent to which it is authorized to adopt local laws by this section, notwithstanding that such provision is a general law, unless the legislature expressly shall have prohibited the adoption of such a local law.

2. Every local government also shall have power to adopt and amend local laws where and to the extent that its legislative body has power to act by ordinance, resolution, rule or regulation.

3. a. A grant of a specific power by this section to one or more local goverments shall not operate to restrict the meaning of a general grant of power by this section to the same or any other local government or to exclude other powers comprehended in such general grant.

b. The enumeration of powers in this section is not intended to imply that any of such powers is not included

within the power of a local government to adopt and amend local laws in relation to its property, affairs and government.

4. In the exercise of its powers to adopt and amend local laws, the legislative body of a local government shall have power:

(a) To delegate to any officer or agency of such local government the power to adopt resolutions or to promulgate rules and regulations for carrying into effect or fully administering the provisions of any local law.

(b) To provide for the enforcement of local laws by legal or equitable proceedings which are or may be provided or authorized by law, to prescribe that violations thereof shall constitute misdemeanors, offenses or infractions and to provide for the punishment of violations thereof by civil penalty, fine, forfeiture or imprisonment, or by two or more of such punishments, provided, however, that a local law adopted pursuant to subdivision two of this section shall provide only for such enforcement or punishment as could be prescribed if the action of the legislative body were taken by ordinance, resolution, rule or regulation, as the case may be.

(c) To enact as local law the provisions of any existing charter, general law or special law, theretofore enacted, conferring a right, power or authority, or imposing a duty or obligation, on such local government, whether or not the same relate to its property, affairs or government. Any such provision of law so reenacted shall thereafter be subject to be superseded by local law only to the same extent and in the same manner as if the same had not been so re-enacted.

(d) In establishing the office of the head of a department of its government, to provide that such an office shall be in the unclassified service of the civil service and, in establishing the offices of one or more deputies to the head of a department of its government with power to act generally for and in place of their principals, to provide that the positions of such deputies shall be in the exempt class of the civil service.

5. Except in the case of a transfer of functions pursuant to the constitution or under an alternative form of county government, a local government shall not have power to adopt local laws which impair the powers of any other public corporation. As amended L.1964, c. 78, §§ 3-5, eff. March 2, retroactive to Jan. 1, 1964.

§ 11. Restrictions on the Adoption of Local Laws

1. Notwithstanding any provision of this chapter, the legislative body shall not be deemed authorized by this chapter to adopt a local law which supersedes a state statute, if such local law:

a. Removes or raises any limitation of law on the amount in which the local government may become indebted, or on the amount which may be raised in any one fiscal year by tax for any or all purposes of such local government provided, however, that if the total bonded indebtedness of any city operating under the provisions of the second class cities law is evidenced only by serial bonds payable in annual installments, any such city may adopt a local law which shall provide that the provisions of section seventy-

two of the second class cities law shall not be operative or applicable as to such city.

b. Removes a restriction of law relating to the issuance of bonds or other evidences of indebtedness.

c. Applies to or affects the maintenance, support or administration of the educational system in such local government, or a teachers' pension or retirement system therein.

d. Except in the case of an alternative form of county government, changes the number or term of office of the members of the county board of supervisors chosen as such in a city or town.

e. Applies to or affects the courts as required or provided by article six of the constitution.

f. Applies to or affects any provision of paragraph (c) of subdivision one of section one hundred ninety-one of the election law, the labor law, sections two, three and four of a chapter of the laws of nineteen hundred sixty-eight, entitled "An act in relation to the maximum hours of labor of certain municipal and fire district firemen and the holidays of firemen and policemen, repealing certain sections of the labor law relating thereto, and to amend the municipal home rule law, in relation thereto," the volunteer firemen's benefit law, or the workmen's compensation law or changes any provision of the multiple residence law or the multiple dwelling law, except that in a city of one million persons or more, the provisions of local law for the enforcement of the housing code which is not less restrictive than the multiple dwelling law may be applied in the enforcement of the multiple dwelling law.

g. Applies to or affects powers of the state comptroller in relation to auditing or examining municipal accounts or prescribing forms of municipal accounting or in relation to approval or disapproval of establishment or extension of fire districts or special districts.

h. Applies to or affects any provision of law providing for regulation or elimination of railroad crossings at grade or terminal facilities within the local government.

i. Relates to the judicial review of dismissals from the civil service or, in the case of a county, changes a provision of law relating to the membership of its civil service commission or to the terms of office of the members of such commission or of the personnel officer administering the provisions of the civil service law.

j. In the case of a city, transfers to abutting property owners its liability for failure to maintain its sidewalks and gutters in a reasonably safe condition.

2. Notwithstanding any provision of this chapter, the legislative body of a county, city or village shall not be authorized by this chapter to adopt any local law which:

a. Amends the charter of the county, city or village, as the case may be, contrary to any provisions of such charter regulating its own amendment. This provision shall not abridge the right of the people of a county, city or village to amend their charter or approve a proposed new charter, where such amendment or proposed new charter is subject to a mandatory referendum.

b. The legislative body is by provision of the charter prohibited to adopt.

3. Notwithstanding any provision of this chapter, any local law adopted by a town board shall be effective and operative only in that portion of such town outside of any village or villages therein except in a case where the power of such town board extends to and includes the area of the town within any such village or villages.

ARTICLE 4—POWERS OF COUNTIES AND CITIES TO ADOPT CHARTERS

Part

1. The county charter law.
2. City charter revision.

PART 1. THE COUNTY CHARTER LAW

Sec.

30. Short title.
31. Application.
32. Definitions.
33. Power to adopt, amend and repeal county charters.
34. Limitations and restrictions.
35. Legislative intent; construction.

§ 30. Short Title

This part shall be known and may be cited and referred to as the "county charter law."

§ 31. Application

This part shall apply to each county of the state except a county in the city of New York.

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§ 32. Definitions

For the purposes of this part, the following terms shall mean and include:

1. "Board of supervisors." The board of supervisors or other elective governing body of a county.

2. "Charter law." A local law providing, amending or repealing a county charter.

3. "County." A county of the state except a county in the city of New York.

4. "County charter." An alternative form of county government provided in accordance with the constitution by act of the legislature or local law.

5. "Local law." A local law adopted by the board of supervisors of a county pursuant to this chapter or other statute generally empowering the county to adopt local laws.

§ 33. Power to Adopt, Amend and Repeal County Charters

1. Subject to restrictions in the constitution, in this article or in any other applicable law, the board of supervisors of any county as defined in section thirty-two of this article and including but not limited to a county which has heretofore adopted a charter enacted by the legislature shall have power to prepare, adopt, amend or repeal a county charter.

2. A county charter shall set forth the structure of the county government and the manner in which it is to function. Such charter may provide for the appointment of

any county officers or their selection by any method of nomination and election, provided that there shall be an elective board of supervisors, the members of which shall be deemed county officers, which shall determine county policies and exercise such other functions as may be assigned to it.

3. Such a county charter shall provide for:

a. The exercise by the board of supervisors of the powers of local legislation and appropriation of the county.

b. The agencies or officers responsible for the performance of the functions, powers and duties of the county and of any agencies or officers thereof and the manner of election or appointment, terms of office, if any, and removal of such officers.

c. The equalization of real property taxes consistent with standards prescribed by the legislature.

4. Such a county charter may:

a. Assign executive or administrative functions, powers and duties to elective or appointive officers.

b. Empower an executive officer elected on a county-wide basis to veto actions of the board of supervisors, with provision for overriding of such vetoes by a specified percentage or percentages of votes of such board.

c. In accordance with subdivision (h) of section one of article nine of the constitution, provide for the transfer of one or more functions or duties of the county or of the cities, towns, villages, districts or other units of government wholly contained in such county to each other or

when authorized by the legislature to the state, or for the abolition of one or more offices, departments or agencies of such units of government when all of their functions or duties are so transferred.

d. Provide for an administrative code which shall set forth the details of administration of the county government in harmony with the provisions of the county charter and may contain revisions, simplifications, consolidations, codifications and restatements of special laws, local laws, ordinances, resolutions, rules and regulations consistent with the county charter.

e. Provide for the termination of the terms of office of existing officers.

5. The board of supervisors by resolution may provide that a draft of a proposed county charter, or of an amendment or repeal thereof, shall be prepared under its supervision, the supervision of an officer or committee of the board, or by a charter commission appointed by or pursuant to such resolution. The county attorney or other legal advisor shall provide such assistance and cooperation as shall be required of him and for such purpose shall have power to employ or retain special counsel and technical advisors and assistants within appropriations made available therefor.

6. Where a petition is filed with the clerk of the board of supervisors signed by electors of the county equal in number to at least ten per centum of the whole number of votes cast in the county for governor at the last gubernatorial election, asking that a charter commission be created by the board of supervisors and be composed and

appointed as provided by the board of supervisors, and where the board of supervisors does not on its own motion create and appoint or provide for the appointment of such a charter commission within three months after such filing, the board of supervisors shall cause a proposition to be submitted to the electors of the county at the next general election occurring not less than five months after such filing, on the question of whether such a charter commission should be so established and appointed. The provisions of subdivision eight of this section shall apply to the preparation of the form of such proposition and its submission at such general election. If such proposition receives a majority of the votes cast thereon in the county at such general election, the board of supervisors within two months after such general election shall provide for the creation of such commission and its members shall be appointed within such two-month period. The provisions of subdivision five hereof, so far as applicable, shall apply to such charter commission.

7. A charter law

(a) providing a county charter, or

(b) proposing an amendment or repeal of one or more provisions thereof which would have the effect of transferring a function or duty of the county, or of a city, town, village, district or other unit of local government wholly contained in the county, shall conform to and be subject to consideration by the board of supervisors in accordance with the provisions of this chapter generally applicable to the form of and action on proposed local laws by the board of supervisors. If a county charter, or a charter law as described in this subdivision, is adopted by the

board of supervisors, it shall not become operative unless and until it is approved at a general election or, in the counties of Dutchess and Orange, at a special election, held in the county by receiving a majority of the total votes cast thereon (a) in the area of the county outside of cities and (b) in the area of the cities of the county, if any, considered as one unit, and if it provides for the transfer of any function or duty to or from any village or for the abolition of any office, department, agency or unit of government of a village wholly contained in the county, it shall not take effect unless it shall also receive a majority of all the votes cast thereon in all the villages so affected considered as one unit. Such a county charter or charter law shall provide for its submission to the electors of the county at the next general election or, in the counties of Dutchess, Orange and Chautauqua at a special election, occurring not less than sixty days after the adoption thereof by the board of supervisors. Such a county charter or charter law may provide for the separate submission to the electors at such election of one or more variations of the provisions of such county charter. Any such variation may include, but shall not be limited to, proposed transfers of functions of local government to other units of local government or a class or classes thereof.

8. The form of each proposition submitted to the electors of a county pursuant hereto shall be prepared by the clerk of the board of supervisors with the advice of the county attorney or other principal legal advisor. They also shall prepare a brief abstract of the county charter or charter law so submitted. The form and abstract shall be transmitted to the board of elections of the county. The board of elections, at least twenty days before the elec-

tion, shall send two or more copies thereof to the clerk of each city, town and village in the county to be made a public record in his office and shall cause a sufficient number of copies to be printed and made available to the electors at the time of registration or otherwise. In addition, such board of elections shall cause a sufficient number of copies to be delivered with the other election supplies and distributed to the electors at the election. The board of elections shall cause each such proposition to be submitted to the electors of the county in the manner provided in the election law and, so far as applicable, in subdivision two of section one hundred two of the county law. Expenses incurred in connection with the submission of any proposition under this article shall be a charge against the county.

9. If two or more propositions having conflicting provisions receive the majorities required for adoption under this section at the same election, the proposition involved in each such conflict which receives the largest affirmative vote shall prevail to the extent of such conflict; but in all other respects such proposition shall be deemed adopted. Where a proposition submitted to the electors of a county under the provisions of this article receives the majority or majorities required for adoption, it shall become operative as prescribed therein, subject to any conditions prescribed therein. As amended L. 1967, c. 3; L. 1968, c. 310, eff. May 21, 1968; L. 1968, c. 361, eff. May 31, 1968.

§ 34. LIMITATIONS AND RESTRICTIONS

1. The legislature hereby imposes the following limitations on the powers of counties to prepare, adopt and amend county charters and charter laws.

New York State Municipal Home Rule Law.

2. Except in accordance with or consistent with laws enacted by the legislature, a county charter or charter law shall not contain provisions relating to:

a. Taxation of the property of the state or of any of its agencies;

b. Exemptions from taxation;

c. Assistance by the state to any unit of local government;

d. The division of the county into two or more counties or the creation, enlargement, diminution or abolition of any city, town, village or school district;

e. The compensation of members of the judiciary fixed by the legislature;

f. The composition, functions, powers, duties or jurisdiction of a court or of the officers thereof, except that functions, powers or duties assigned to units of local government or agencies or officers thereof outside the judicial system may be transferred to other units of local government, agencies or officers as authorized by this article.

3. Except in accordance with provisions of this chapter or with other laws enacted by the legislature, a county charter or charter law shall not supersede any general or special law enacted by the legislature:

a. Which relates to the imposition, judicial review or distribution of the proceeds of taxes or benefit assessments;

b. Insofar as it relates to the educational system in the county or to school districts therein, except that functions,

powers or duties assigned to units of local government or to agencies or officers thereof outside the educational system may be transferred to other units of local government, agencies or officers as authorized by this article;

c. Which requires that specified functions of government be performed by or financed by units of local government, except that any of such functions may be transferred to other units of local government, agencies or officers as authorized by this article;

d. Insofar as it relates to a function, power or duty of the state or of any officer or agency thereof which is financed directly by the state;

e. Insofar as it relates to the commencement or prosecution of actions or proceedings against the county;

f. Insofar as it relates to a public benefit corporation;

g. In this chapter or in the civil service law, condemnation law, conservation law, election law, executive law, judiciary law, labor law, local finance law, multiple dwelling law, multiple residence law, public authorities law, public housing law, public service law, railroad law, retirement and social security law, state finance law, volunteer firemen's benefit law, or workmen's compensation law.

4. After the adoption of a county charter by a county, no law enacted by the legislature pursuant to paragraph two of subdivision (h) of section one of article nine of the constitution which does not apply alike to all counties outside the city of New York, and no charter law or local law, which in its application to such county abolishes or creates an elective county office, changes the voting or veto power of or the method of removing an elective county offi-

cer during his term of office, abolishes, curtails or transfers to another county officer or agency any power of an elective county officer, or changes the form or composition of the board of supervisors of such county, shall become effective in such county until at least sixty days after its final enactment. If (a) the legislature in enacting such a law shall provide that it shall be submitted to the qualified electors of the county for their approval, or (b) the board of supervisors on its own motion, in the manner provided by subdivision four of section one hundred one of the county law, shall provide that such a charter law or local law adopted by it shall be submitted to the qualified electors of the county for their approval, or (c) within such sixty days electors of the county, duly registered to vote therein either for the last preceding or the next following general election, in number equal to at least five per centum of the total number of votes cast in the county for governor at the last gubernatorial election, shall file a petition with the county clerk or corresponding officer of the county protesting against such law, charter law or local law, it shall become effective in such county only if approved by the electors thereof at the next ensuing general election held at least sixty days thereafter, subject to the conditions provided in subdivision seven of section thirty-three of this chapter for the adoption of a county charter when voted on by the electors of a county.

§ 35. LEGISLATIVE INTENT; CONSTRUCTION

1. It is the intention of the legislature by this county charter law to provide for carrying into effect the provisions of paragraph (h) of subdivision one of article nine of the constitution and, pursuant to the direction contained

therein, to empower counties to prepare, adopt and amend county charters by local legislative action, subject to limitations imposed herein.

2. It is not the intention of the legislature hereby to (a) abolish or curtail any powers or rights heretofore conferred upon or delegated to a county or counties or to any of the units of government therein or to any board, commission, body or officer thereof, or (b) adversely to affect the power of a county to adopt, amend or repeal county charters, county laws or local laws pursuant to any other authorization of the legislature, unless a contrary intention is clearly manifested from the express provisions of this county charter law or by necessary intendment therefrom.

3. This county charter law shall be construed liberally. The powers herein granted shall be in addition to any other powers granted to counties by any other provisions of general or special laws, including but not limited to charters, administrative codes, special acts or local laws. A permissive procedure authorized hereby shall not be deemed to be exclusive or to prohibit the use of any other procedure authorized by any general or special act of the legislature, charter, administrative code or local law lawfully adopted and still in effect.

4. All existing state, county, local and other laws or enactments, including charters, administrative codes and special acts having the force of law shall continue in force until lawfully amended, modified, superseded or repealed.

5. If any provision of the county charter law is not clear or requires elaboration in its application to the county, the

board of supervisors may interpret such provision in a local law not inconsistent with the provisions hereof. Where any question arises concerning the transition to a charter law which is not provided for herein, the board of supervisors may provide for such transition by a local law not inconsistent with the provisions hereof.

6. If any provision of this county charter law shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof but shall be confined in its operation to the particular provision directly involved in the controversy in which such judgment is rendered.

New York State Election Law

§ 64. CREATION AND ALTERATION OF ELECTION DISTRICTS. 1. In the cities of New York and Buffalo, and cities and towns of the counties of Monroe, Nassau and Suffolk, respectively, the creation or the consolidation, division or other alteration of election districts shall be done by the board of elections, and in any other city or in any other town by the common council or town board. Every town or ward, not subdivided into election districts, shall be an election district. Each assembly district wholly in the city of New York, and that portion of an assembly district partially in the city of New York containing therein more than seven hundred voters, and elsewhere each town or ward having more than seven hundred voters, shall be divided into election districts, provided that if two machines are to be used at the polling

place, a town or ward having not more than one thousand voters need not be divided. Any town or ward may be so divided when the convenience of voters will be promoted thereby.

[Amended by chap. 976, Laws of 1964.]

2. Any creation, consolidation, division or alteration of election districts in any year shall be made on or before July first, to take effect on the ensuing first day of October, except that when required by the creation or alteration of a political subdivision, other than an election district, in which candidates are to be voted for at the fall primaries, it shall take effect immediately. In case of excessive registration in any year, an election district may be divided to take effect before the general election.

3. Each election district shall be compact in form. It shall not contain portions of two wards, towns, counties, assembly or congressional districts. Except as otherwise provided in a local or special act, it shall not be partly within and partly without a city. It shall not be partly within and partly without a village having five thousand or more inhabitants except with the written approval of the board of elections, filed with the town clerk. As nearly as may be, except as above provided, and except in the city of New York, an election district shall contain six hundred voters where one voting machine is used and nine hundred voters where two voting machines are used, but it may contain a less number where the convenience of the voters will be promoted thereby, or where that is necessary to enable all the voters to vote for the same offices.

4. An election district in the city of New York shall use one voting machine where there are seven hundred fifty

voters or less, and two voting machines where there are more than seven hundred fifty voters, except that in any district where there are more than seven hundred fifty voters but less than eight hundred voters, the board of elections shall determine the number of machines to be used in such district.

5. When necessary, in order to comply with this section, the election districts into which a town, ward or assembly district is or may be divided may be consolidated, divided or otherwise altered, or new districts may be created, or a town or ward so divided may be made one election district, but the election districts of a town, ward or assembly district shall not be altered or new election districts created because of excessive number of voters in any such election district until such number shall exceed by at least fifty the number above specified, except that in any year following an election year in which the voters may vote for the office of presidential electors, no additional election districts need be created.

6. In the event the common council or the town board fails to create, consolidate, divide or alter election districts by July second, when required, pursuant to the provisions of this section, the board of elections of the county wherein such common council or town board is located, shall do the same.

§ 65. MAPS OF CONGRESSIONAL, SENATORIAL, ASSEMBLY AND ELECTION DISTRICTS. 1. The secretary of state, at the expense of the state, shall publish a map showing the county or counties contained in each of the congressional districts of the state; a map showing the county or coun-

ties in each of the senatorial districts of the state and a map showing the county or counties contained in each of the assembly districts of the state.

2. Where a portion of a county is contained in any congressional, senatorial or assembly district, he shall publish a map showing the portion of such county contained in each such respective district. Such map or maps shall show the extreme boundaries of the portion of the county so contained, as described by the street boundary and shall have printed thereon the names of the streets or public ways bounding the district; provided however, that where the extreme boundary consists of the boundary line of any city, town or village, it shall be sufficient to so indicate, without showing or naming indivdual streets or public ways.

3. He shall also publish three individual maps of each borough of the city of New York, one of which shall show all of the congressional districts or parts thereof contained in such borough; one of which shall show all of the senatorial districts or parts thereof contained in such borough and one of which shall show all of the assembly districts or parts thereof contained in such borough. Each such map shall show the extreme boundaries of the districts to which it refers, as described in the street boundary and shall have printed thereon the names of the streets or public way bounding the district.

4. All such maps shall be to scale. Pertinent copies of such maps shall be filed and kept open to public inspection as follows: one in the office of the town or city clerk, except in the city of New York; one in the office of every

board of elections, and in the city of New York, in the board of elections and each branch office, if any. Surplus copies, if any, may be sold at cost and the proceeds remitted to the secretary of state. Whenever the boundaries of any congressional, senatorial, or assembly district are altered after the first publication of such maps, the secretary of state shall publish revised copies of those maps affected by such boundary alteration and make the distribution as required in this subdivision.

5. A map or separate maps of uniform scale of election districts within a town or ward, or, in the city of New York, within an assembly district, wholly within such city or within that portion of any assembly district within such city, shall be made by the board or body creating or altering the districts so that the map or maps on file at any time will show the existing election districts in such town, ward, assembly district, or the appropriate portion of such assembly district.

In a city, street corner numbers of the block or blocks defining the extreme boundaries of each election district shall be printed on the map or maps, within or outside the block line or lines, so as to show plainly the highest and lowest street numbers within the election district of every street bounding the district. Copies of such maps or descriptions shall be filed and kept open to public inspection as follows: one in the office of the town or city clerk, except in the city of New York; one in the office and each branch office if any of the board of elections. Surplus copies, if any, of maps of election districts in a city or town may be sold at cost and the proceeds paid to the county, city or town which incurred the expense of preparing the maps.

New York State Election Law.

6. In a city, immediately before the first day of registration in each year, the board or body authorized to create or alter election districts shall cause copies of such map or maps to be posted in such places in the several wards or assembly districts, or appropriate portions of assembly districts as, in its judgment will be best suited for informing the voters interested therein, and shall furnish to the inspectors of election in each election district, on the first day of registration in each year, election day, primary election day, and special election days, if any, a map or maps showing such election district and at least the adjacent election districts and a list of the registration and polling places in the ward or assembly district. In the week preceding a primary, in any year, the board of elections, in its discretion, may cause to be posted, in a city, copies of the map or maps showing the election districts in which the primary is to be held.

7. In a town, after the creation or alteration of any election district therein, the board creating or altering such district shall furnish to the inspectors of election in each election district, on the first day of registration next occurring, a map or description showing such election district and also immediately before the ensuing general election shall cause copies of the map or maps, or description or descriptions, of the election districts in the town to be posted in such places as, in its judgment, will be best suited for informing the voters interested therein.

8. In order to facilitate the publication of such maps as he is required by this section to publish, there shall be made available to the secretary of state at his request by

every board of elections, the maps or copies thereof, described in paragraph five of this section.

§ 136. RULES CONCERNING DESIGNATING PETITIONS.

5. A signature made earlier than twelve weeks before the primary election shall not be counted.

§ 191. DATES OF PRIMARY ELECTIONS AND GENERAL ELECTIONS; TIME OF OPENING AND CLOSING POLLS. 1. (a) A primary election, to be known as the spring primary shall be held in the year nineteen hundred sixty-six and annually thereafter on the third Tuesday in June before the general election. All of the provisions of law relating to the spring and fall primary elections shall apply to the spring primary election provided for by this paragraph as hereby amended. All references to the spring and fall primary elections contained in this chapter shall be construed as references, whenever appropriate and applicable, to such spring primary election.

* * *

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HAMILTON COUNTY

	1915	1920	1925	1930	1940	1950	1960
Arietta	***	***	***	***	***	***	235
Benson	***	***	***	***	***	***	87
Hope	***	***	***	***	***	***	234
Indian Lake	***	***	***	***	***	***	1,186
Inlet	***	***	***	***	***	***	307
Lake Pleasant	***	***	***	***	***	***	718
Long Lake	***	***	***	***	***	***	896
Morehouse	***	***	***	***	***	***	65
Wells	***	***	***	***	***	***	539
Totals	***	***	***	***	***	***	4,267

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ROCKLAND COUNTY

	1915	1920	1925	1930	1940	1950	1960
Clarkstown	***	***	***	***	***	***	33,196
Haverstraw	***	***	***	***	***	***	16,632
Orangetown	***	***	***	***	***	***	43,172
Ramapo	***	***	***	***	***	***	35,064
Stony Point	***	***	***	***	***	***	8,739
Totals	***	***	***	***	***	***	136,803

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COUNTY RECAPITULATION

POPULATION

Counties	1915	1920	1925	1930	1940	1950	1960 final
Albany	***	***	***	***	***	***	272,926
Allegany	***	***	***	***	***	***	43,978
Bronx	***	***	***	***	***	***	1,424,815
Broome	***	***	***	***	***	***	212,661
Cattaraugus	***	***	***	***	***	***	80,187
Cayuga	***	***	***	***	***	***	73,942
Chautauqua	***	***	***	***	***	***	145,377
Chemung	***	***	***	***	***	***	98,706
Chenango	***	***	***	***	***	***	43,243
Clinton	***	***	***	***	***	***	72,722
Columbia	***	***	***	***	***	***	47,322
Cortland	***	***	***	***	***	***	41,113
Delaware	***	***	***	***	***	***	43,540
Dutchess	***	***	***	***	***	***	176,008
Erie	***	***	***	***	***	***	1,064,688
Essex	***	***	***	***	***	***	35,300
Franklin	***	***	***	***	***	***	44,742
Fulton	***	***	***	***	***	***	51,304
Genesee	***	***	***	***	***	***	53,994
Greene	***	***	***	***	***	***	31,372
Hamilton	***	***	***	***	***	***	4,267
Herkimer	***	***	***	***	***	***	66,370
Jefferson	***	***	***	***	***	***	87,835
Kings	***	***	***	***	***	***	2,627,319
Lewis	***	***	***	***	***	***	23,249
Livingston	***	***	***	***	***	***	44,053
Madison	***	***	***	***	***	***	54,635
Monroe	***	***	***	***	***	***	586,387
Montgomery	***	***	***	***	***	***	57,240
Nassau	***	***	***	***	***	***	1,300,171
New York	***	***	***	***	***	***	1,698,281
Niagara	***	***	***	***	***	***	242,269
Oneida	***	***	***	***	***	***	264,401

Counties	1915	1920	1925	1930	1940	1950	1960 final
Onondaga	•••	•••	•••	•••	•••	•••	423,028
Ontario	•••	•••	•••	•••	•••	•••	68,070
Orange	•••	•••	•••	•••	•••	•••	183,734
Orleans	•••	•••	•••	•••	•••	•••	34,159
Oswego	•••	•••	•••	•••	•••	•••	86,118
Otsego	•••	•••	•••	•••	•••	•••	51,942
Putnam	•••	•••	•••	•••	•••	•••	31,722
Queens	•••	•••	•••	•••	•••	•••	1,809,578
Rensselaer	•••	•••	•••	•••	•••	•••	142,585
Richmond	•••	•••	•••	•••	•••	•••	221,991
Rockland	•••	•••	•••	•••	•••	•••	136,803
St. Law'ce	•••	•••	•••	•••	•••	•••	111,239
Saratoga	•••	•••	•••	•••	•••	•••	89,096
Schenectady	•••	•••	•••	•••	•••	•••	152,896
Schoharie	•••	•••	•••	•••	•••	•••	22,616
Schuyler	•••	•••	•••	•••	•••	•••	15,044
Seneca	•••	•••	•••	•••	•••	•••	31,984
Steuben	•••	•••	•••	•••	•••	•••	97,691
Suffolk	•••	•••	•••	•••	•••	•••	666,784
Sullivan	•••	•••	•••	•••	•••	•••	45,272
Tioga	•••	•••	•••	•••	•••	•••	37,802
Tompkins	•••	•••	•••	•••	•••	•••	66,164
Ulster	•••	•••	•••	•••	•••	•••	118,804
Warren	•••	•••	•••	•••	•••	•••	44,002
Washington	•••	•••	•••	•••	•••	•••	48,476
Wayne	•••	•••	•••	•••	•••	•••	67,989
W'chester	•••	•••	•••	•••	•••	•••	808,891
Wyoming	•••	•••	•••	•••	•••	•••	34,793
Yates	•••	•••	•••	•••	•••	•••	18,614
Totals	•••	•••	•••	•••	•••	•••	16,782,304

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ABATE ET AL. *v.* MUNDT ET AL.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 71. Argued November 19, 1970—Decided June 7, 1971

For more than a century the Rockland County board of supervisors consisted of the supervisors of the county's five towns, resulting in extensive functional interrelationships and intergovernmental coordination between county and towns. Severe malapportionment due to population growth led to court-ordered reapportionment. The proposed plan, challenged by petitioners, provides for a county legislature of 18 members chosen from five districts, corresponding with the towns, each district being assigned legislators in the proportion of its population to that of the smallest town. The plan produces a total deviation from equality of 11.9%. The Court of Appeals of New York upheld the plan. *Held:* In light of the long tradition of overlapping functions and dual personnel in the Rockland County government and the fact that the plan does not contain any built-in bias favoring particular political interests or geographic areas, the plan is not violative of the Equal Protection Clause. Pp. 3–5.

25 N. Y. 2d 309, 253 N. E. 2d 189, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, WHITE, and BLACKMUN, JJ., joined. HARLAN, J., filed a statement concurring in the result. STEWART, J., curring in the result. STEWART, J., concurred in the judgment. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71.—October Term, 1970

Samuel J. Abate, Etc., et al., Petitioners, v. Paul F. Mundt et al. | On Writ of Certiorari to the Court of Appeals of New York.

[June 7, 1971]

Mr. Justice Marshall delivered the opinion of the Court.

In this case, petitioners challenge the constitutionality of a reapportionment plan proposed in response to both federal and state court findings of malapportionment in Rockland County, New York. The Court of Appeals for the State of New York upheld the plan. We affirm.

For more than 100 years, Rockland County was governed by a board of supervisors consisting of the supervisors of each of the county's five constituent towns. This county legislature was not separately elected; rather its members held their county offices by virtue of their election as town supervisors—a pattern which typified New York county government. The result has been a local structure in which overlapping public services are provided by the towns and their county working in close cooperation. For example, in Rockland County the towns adopt their own budgets and submit them to the county which levies taxes. These taxes are based on real property assessments established by the towns but equalized by the county board. Similarly, public services such as waste disposal and snow removal are provided through cooperative efforts among the municipalities. There is

no indication that these joint efforts have declined in importance; in fact, respondents strenuously urge that the county's rapidly expanding population has amplified the need for town and county coordination in the future.

The county's increased population also produced severe malapportionment—so severe that, in 1966, a federal district court required that the county board submit a reapportionment plan to the Rockland County voters, *Lodico* v. *Board of Supervisors*, 256 F. Supp. 440 (SDNY 1966). Pursuant to that order, three different plans were devised and submitted to the electorate; but each was rejected at the polls. The present action was brought in 1968 to compel the board to reapportion. After its initial proposal was rejected by the New York courts, the board submitted the plan which is the subject of this decision.

The challenged plan, based on 1969 population figures, provides for a county legislature composed of 18 members chosen from five legislative districts. These districts exactly correspond to the county's five constituent towns. Each district is assigned its legislators according to the district's population in relation to the population of the smallest town, Stony Point. Stony Point has a population of 12,114 and is assigned one representative in the county legislature. The number of representatives granted the other districts is determined by dividing the population of each by the population of the smallest town. Fractional results of the computation are rounded to the nearest integer, and this need to round off "fractional representatives" produces some variations among districts in terms of population per legislator. Under 1969 population figures, the Orangetown district is the most "under-represented" (7.1%); while Clarkstown is the most "over-represented" (4.8%). Thus the plan presently produces a total deviation from

population equality of 11.9%.[1] Petitioners attack these deviations as unconstitutional.[2]

It is well established that electoral apportionment must be based on the general principle of population equality and that this principle applies to state and local elections, *Avery* v. *Midland County*, 390 U. S. 474, 481 (1968). "Mathematical exactness or precision is hardly a workable constitutional requirement," *Reynolds* v. *Sims*, 377 U. S. 533, 577 (1964), but deviations from population equality must be justified by legitimate state considerations, *Swann* v. *Adams*, 385 U. S. 440, 444 (1966). Because voting rights require highly sensitive safeguards, this Court has carefully scrutinized state interests offered to justify deviations from population equality.

In assessing the constitutionality of various apportionment plans, we have observed that viable local governments may need considerable flexibility in municipal arrangements if they are to meet changing societal needs, *Sailors* v. *Kent Board of Education*, 387 U. S. 105, 110–111 (1967), and that a desire to preserve the integrity of political subdivisions may justify an apportionment plan which departs from numerical equality. *Reynolds* v. *Sims*, 377 U. S. 533, 578 (1964). These observations,

[1] All of the population figures and percentage deviations are:

District	*Population**	*Number of Representatives*	*Percentage** Deviations*
Stony Point	12,114	1	.3
Haverstraw	23,676	2	2.5
Orangetown	52,080	4	—7.1
Clarkstown	57,883	5	4.8
Ramapo	73,051	6	— .2

*1969 Population data.

**(—) refers to "under-represented."

[2] Petitioners also attack the plan's use of multimember districts. However, they have not shown that these multimember districts, by themselves, operate to impair the voting strength of particular racial or political elements of the Rockland County voting population, see *Burns* v. *Richardson*, 384 U. S. 73, 88 (1966).

along with the facts that local legislative bodies frequently have fewer representatives than do their state and national counterparts and that some local legislative districts may have a much smaller population than do congressional and state legislative districts, lend support to the argument that slightly greater percentage deviations may be tolerable for local government apportionment schemes, cf. *Reynolds* v. *Sims, supra,* at 578. Of course, this Court has never suggested that certain geographic areas or political interests are entitled to disproportionate representation. Rather our statements have reflected the view that the particular circumstances and needs of a local community as a whole may sometimes justify departures from strict equality.

Accordingly, we have underscored the danger of apportionment structures which contain a built in bias tending to favor particular geographic areas or political interests or which necessarily will tend to favor, for example, less populous districts over their more highly populated neighbors, see *Hadley* v. *Junior College District,* 397 U. S. 50, 57–58 (1970). In this case, we have no such indigenous bias; there is no suggestion that the Rockland County plan was designed to favor particular groups. It is true that the existence of any deviations from strict equality means that certain districts are advantaged at that point in time; but, under this plan, changing demographic patterns may shift electoral advantages from one town to another.[3]

The mere absence of a built in bias is not, of course, justification for a departure from population equality. In this case, however, Rockland County defends its plan by asserting the long history of, and perceived need for,

[3] Naturally, we express no opinion on the contention that, in future years, the Rockland County plan may produce substantially greater deviations than presently exist. Such questions can be answered if and when it becomes necessary to do so.

close cooperation between the county and its constituent towns. The need for intergovernmental coordination is often greatest at the local level, and we have already commented on the extensive functional interrelationships between Rockland County and its towns. But because almost all governmental entities are interrelated in numerous ways, we would be hesitant to accept this justification by itself. To us, therefore, it is significant that Rockland County has long recognized the advantages of having the same individuals occupy the governing positions of both the county and its towns. For over 100 years, the five town supervisors were the only members of the county board, a system which necessarily fostered extensive interdependence between the towns and their county government. When population shifts required that some towns receive a greater portion of seats on the county legislature, Rockland County responded with a plan which substantially remedies the malapportionment and which, by preserving an exact correspondence between each town and one of the county legislative districts, continues to encourage that town supervisors also serve on the county board.

We emphasize that our decision is based on the long tradition of overlapping function and dual personnel in Rockland County government and on the fact that the plan before us does not contain a built in bias tending to favor particular political interests or geographic areas. And nothing we say today should be taken to imply that even these factors could justify substantially greater deviations from population equality. But we are not prepared to hold that Rockland County reapportionment plan violates the Constitution, and, therefore, we affirm.

MR. JUSTICE HARLAN concurs in the result for the reasons stated in his separate opinion in *Whitcomb* v. *Chavis*, *ante*, — U. S. —.

MR. JUSTICE STEWART concurs in the judgment.

SUPREME COURT OF THE UNITED STATES

No. 71.—October Term, 1970

Samuel J. Abate, Etc., et al., Petitioners, *v.* Paul F. Mundt et al. | On Writ of Certiorari to the Court of Appeals of New York.

[June 7, 1971]

Mr. Justice Brennan, with whom Mr. Justice Douglas joins, dissenting.

The Court today reaffirms all of the principles of *Reynolds* v. *Sims*, 377 U. S. 533 (1964), and its progeny but refuses, for a combination of reasons unpersuasive to me, to apply those principles to this apportionment scheme. I believe that our recent decisions in *Avery* v. *Midland County*, 390 U. S. 474 (1968); *Kirkpatrick* v. *Preisler*, 394 U. S. 526 (1969), and *Wells* v. *Rockefeller*, 394 U. S. 542 (1969), require reversal and I therefore dissent.

The Court holds that "a desire to preserve the integrity of political subdivisions may justify an apportionment plan which departs from numerical equality. *Reynolds* v. *Sims*, 377 U. S. 533, 578 (1964)." *Ante*, at [3]. The Court's reliance on *Reynolds* is misplaced. We said there that "it may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting." 377 U. S., at 578. But we warned that "[t]o do so would be constitutionally valid, *so long as* the resulting apportionment was one based substantially on population and the equal-population principle was not diluted in *any* significant way." *Ibid.* (emphasis added). Moreover, the Court did not at that point in time "deem it expedient . . . to attempt to spell out any precise constitutional tests." We have done so since.

In *Kirkpatrick* v. *Preisler, supra,* we explained that because "[t]oleration of even small deviations detracts from" the constitutional command of "equal representation for equal numbers of people," only those "limited population variances which are unavoidable despite a good faith effort to achieve absolute equality, or for which justification is shown" are permissible. 394 U. S., at 531. "[T]he State must justify each variance, no matter how small." *Ibid.* On the record presented here it is clear that such a good-faith effort has not been made. Nor can it be said that sufficient justification has been demonstrated for an 11.9% deviation from voting equality.

The plan approved here allegedly represents as close to mathematical exactness as is possible without changing existing political boundaries or using weighted or fractional votes. But a plan devised under these constraints is not devised in the good-faith effort that the Constitution requires. In *Wells* v. *Rockefeller, supra,* we struck down a similar plan. We held that an attempt to maintain existing county lines was insufficient justification for a 12.1% variance. In explanation we stated that an attempt "to keep regions with distinct interests intact" was insufficient because to accept such a justification "would permit groups of districts with defined interest orientations to be overrepresented at the expense of districts with different interest orientations." 394 U. S., at 546. That is precisely what we are dealing with here. The attempt to maintain existing town lines has resulted in a variance from equality of 11.9%. I cannot believe that a .2% differential is the determining factor in approving this apportionment scheme.

The Court explains that it is rather a combination of factors which dictates this result, and that among them is the fact that New York has a long history of maintaining the integrity of existing counties. It is not clear to

me why such a history, no matter how protracted, should alter the constitutional command to make a good-faith effort to achieve equality of voting power as near to mathematical exactness as is possible.

Today's result cannot be excused by asserting that local governments are somehow less important than national or state governments. We have already fully applied the principle of one-man, one-vote to local polities because "the States universally leave much policy and decisionmaking to their governmental subdivisions. . . . In a word, institutions of local government have always been a major aspect of our system, and their responsible and responsive operation is today of increasing importance to the quality of life of more and more of our citizens." *Avery* v. *Midland County*, 390 U. S., at 481.

It is clear to me that none of the factors relied upon by the Court today can, singly or in combination, justify this variation. Obviously no other local apportionment scheme can possibly present the same combination of factors relied on by the Court today. In that sense this decision can have little or no precedential value. Nevertheless, I cannot help but regret even this small departure from the basic constitutional concept of one-man, one-vote.